Lorraine Mitchell - Legal Briefs
732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021
TELEPHONE: (213) 747-5631

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-804

JOY A. FARMER, Special Administrator of the Estate of Richard T. Hill,

Plaintiff-Petitioner,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 25, et al.,

Defendants-Respondents.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION FIVE

BRIEF FOR THE PETITIONER

G. DANA HOBART
GERALD KANE
3008 Wilshire Boulevard
Suite 200
Los Angeles, California 90010
(213) 385-5154

Attorneys for Plaintiff-Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75 - 804

JOY A. FARMER, Special Administrator of the Estate of Richard T. Hill,

Plaintiff-Petitioner,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 25, et al.,

Defendants-Respondents.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION FIVE

BRIEF FOR THE PETITIONER

G. DANA HOBART
GERALD KANE
3008 Wilshire Boulevard
Suite 200
Los Angeles, California 90010
(213) 385-5154

Attorneys for Plaintiff-Petitioner

TOPICAL INDEX

TABLE OF AUTHORITIES

Constitutions

Rules

Statutes

Texts

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1975
No. 75-804

JOY A. FARMER, Special Administrator
of the Estate of Richard T. Hill,

Plaintiff-Petitioner,

vs.

UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS
OF AMERICA, LOCAL 25,
et al.,

Defendants-Respondents.

On Writ of Certiorari to the California
Court of Appeal, Second Appellate District,
Division Five

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeal of the State of California is reported at 49 Cal. App. 3d 614 and at 122 Cal. Rptr. 722. The opinion is reproduced as Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

The opinion and judgment of the Court of Appeal was filed on June 30, 1975. (See Appendix A to Petition for Writ of Certiorari.) A timely Petition for Hearing in the California Supreme Court was denied without opinion on September 10, 1975. (See Appendix B to Petition for Writ of Certorari.) A timely Petition for Certiorari was filed in this Court on December 5, 1975. A Writ of Certiorari was granted on January 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

At issue herein is whether a union member who is subjected to protracted and intentional infliction of grievous emotional distress by officials of his Union in pursuance of a vicious vendetta and in clear violation of state tort law may bring an action in state court for damages for redress of the injuries done him, or whether such action should be deemed preempted by the Labor-Management Relations Act of 1947 (29 U.S.C. §§141, et seq.) and the subject matter of the action deemed within the exclusive jurisdiction of the National Labor Relations Board, when the Act does not address

STATEMENT OF THE CASE

A. Factual Background[1]

Plaintiff and Petitioner Richard T. Hill[2] was at all relevant times a carpenter by trade. (RT 472.) At all relevant times, he belonged to Defendant and Respondent Local 25 of the United Brotherhood of Carpenters and Joiners of America. (RT 473.)[3]

In 1965, Petitioner was elected to a three-year term as vice-president of Local 25. (RT 473-474.) In the course of the performance of his official duties, Petitioner came increasingly into conflict with one of the Local's business agents, Defendant and Respondent E. G. "Blackie" Daley, who, though only one of three business agents for the Local, held effective control of the Local's affairs. (RT 475, 1684, 1900-1901.)

Petitioner disagreed with Daley on a number of subjects, including the way Daley dispatched workers from the Local's hiring hall, the propriety of loans made by the Local's credit union and the use or misuse of union funds. (RT 484-486, 495-496, 498-501.) By the end of 1966 Petitioner and Daley had become openly hostile. (RT 809-810, 1520, 1554.) In early 1967, Petitioner incurred Daley's further displeasure by filing intra-union charges against Daley for misuse of union funds. (RT 587-588.) Somewhat later, Petitioner decided to run for the office of Local president in the 1968 election, and to oppose Daley's re-election as business agent.

1/ Because the occurrence of the events giving rise to this lawsuit is not in issue here, Petitioner presents in this brief only a short summary of those events. A more detailed treatment of the facts may be found at pages 4-33 of the Respondent's Brief which Petitioner filed in the Court of Appeal and which is included as part of the record certified to this Court.

2/ Mr. Hill died on January 28, 1976, after Certiorari was granted herein. A motion to substitute Joy A. Farmer, special administrator of Mr. Hill's estate, in place of Mr. Hill was granted on June 1, 1976. Because this brief was written and much of it was reproduced prior to receipt of notice that the motion for substitution had been granted, the term "Petitioner" as used herein should be understood as referring to Mr. Hill rather than to Ms. Farmer.

3/ References to the Reporter's Transcript will be made herein by the letters "RT," followed by page numbers. References to the Clerk's Transcript will be made by the letters "CT," followed by page numbers.

He so informed Daley. (RT 666.)

Petitioner's opposition to Daley and to Daley's policies triggered a campaign of intimidation directed at Petitioner (and sometimes at those seen associating with him) by Daley and those effectively under Daley's control. This campaign, which began in late 1966, took the form of numerous and continuing threats of starvation, frequent public ridicule, incessant verbal abuse, most of it profane, on one occasion interference with Petitioner's performance of his duties as Local vice-president, and on at least one occasion an actual battery. (RT 492, 505, 528-529, 533, 591-593, 1063-1066, 1556-1560, 1598, 1664, 1670, 1685-1686.) More significantly, it involved refusal to dispatch Petitioner from the Local's hiring hall to any but the briefest and least desirable jobs, in violation of express intra-union rules and provisions of the union-management agreement governing the operation of the hiring hall and in contravention of long-established hiring hall practices. (R.T. 249-269, 320-323, 374, 407-408, 429, 440, 539, 1121, 1166-1167, 1197-1198, 1362-1363, 1436, 2625-2630.)

The record establishes that Daley and other Local officials under his control went to extraordinary lengths to prevent Petitioner from obtaining his proper share of work for the express purpose of driving Petitioner from the Local. (RT 529, 533, 1558-1560, 1664.) Daley and his subordinates falsified union records to justify removing Petitioner from the top of the

Local's out-of-work list and placing him at the bottom, thereby causing weeks of unemployment. (RT 507, 881-882, 1230-1231, 1246, 1444, 2639-2658.) They deliberately offered him jobs for which he was not qualified and used his refusal of such jobs as a pretext for placing him at the end of the out-of-work list and effectively out of work for periods of weeks. (RT 507-510, 637-640, 656-660, 2157, 2164-2166.) They dispatched Petitioner to jobs of only a few days' duration, jobs which he would have had a right to refuse without penalty, but of whose short duration he was told nothing, even though the usual practice was to tell the affected member of that fact before he accepted such a dispatch. In two instances, when he went to the jobsite and learned that the employment was of short duration, he refused the job, but was nonetheless moved to the bottom of the out-of-work list. In another, he accepted the job without learning that it would be of short duration and was likewise moved to the bottom of the list. While Petitioner was receiving these short-term dispatches, others under Hill on the out-of-work list were receiving dispatches of several months' duration. (RT 263, 623-624, 636, 647, 1121, 1196-1198, 1362-1363, 1436.) On one occasion, Petitioner was even dispatched to a job that did not exist, effectively preventing him from obtaining one of several good dispatches that day. (RT 642-646; see also 636-640, 2157, 2164-2166, 2173, 2658.)

Unable to secure a job through ordinary hiring hall dispatching procedures, Petitioner

approached potential employers in an attempt to get them to request the hiring hall to dispatch him, a permitted and not uncommon practice for out-of-work carpenters. One employer did specifically request petitioner's dispatch, but Local officials, in violation of hiring hall rules, refused to dispatch Petitioner. (RT 539-559, 572-576, 1505-1508.)

Daley on one occasion also used Petitioner's refusal of a job for which he was not qualified as an excuse to report to the Department of Employment that Petitioner was not available for work, thereby causing Petitioner's unemployment benefits to be cut off pending the Department's review of the matter. It was unprecedented for union officials to report such a refusal to the Department of Employment. (RT 472, 507-518, 1561-1562.)[4/]

Petitioner's attempts to secure redress of the misconduct of Daley and the other officials under his control brought him scant relief. Petitioner complained to the National Labor Relations Board in May of 1967 about the Local's refusal to dispatch him in response to the specific employer request and was awarded some

---

4/ Petitioner's benefits for the affected period were paid him weeks later. (RT 893.)

$2500 in lost wages. (RT 671, 2683-2685.)[5/] Far from deterring the misconduct of Daley, however, the charges and the award provoked an even more intense course of threats and intimidation. (RT 675.)

Petitioner also sought redress from the Los Angeles District Council of the United Brotherhood of Carpenters and Joiners, also a Defendant and Respondent herein, several times complaining to it of his mistreatment at Daley's hands. The District Council in each instance refused to do anything in response to Petitioner's entreaties. (RT 579-582, 593-605.)

Through the efforts of Daley and those under his control, Petitioner remained unemployed, except for jobs of brief duration, from early 1967 until mid-1968. (RT 616-624, 2477-2478.) During this time, he was forced to subsist on unemployment benefits, disability benefits

---

5/ The Court of Appeal correctly noted that this was not the only occasion on which Petitioner went to the Board. (Appendix A to Petition for Writ of Certiorari, p. 23.) The record provides no support, however, for the Court's apparent belief that there were several further charges filed or that any of them concerned job referral discrimination. The record reveals only that one additional charge was filed and later withdrawn. It does not disclose the nature of that charge. (RT 2686-2691.)

and $2200 in savings bonds which he had accumulated over the years. (RT 576, 609-611.) The frustration of forced idleness, the continuing erosion of his savings and the effects of the open hostility of Daley and other officials loyal to Daley soon took their toll on Petitioner's health. The nervous stress engendered by the campaign of intimidation and job discrimination caused Petitioner to suffer headaches, dizziness and gastrointestinal distress. (RT 534-536.) Petitioner had little desire to eat or drink and lost forty pounds during the period. (RT 538, 576.) Petitioner was hospitalized in April of 1967 for tests, but no organic cause was found for his symptoms, his doctor determining that the symptoms resulted from his employment problems and his conflict with Daley. (RT 535-538, 575-576, 1732, 1747-1758, 1763-1766.) Petitioner was unable to work and under a doctor's care from early April of 1967 until May, and again from later in May until December of 1967. (RT 538, 574-576, 616.)

Daley's attempts to drive or starve Petitioner out of Local 25 continued until mid-1968. As he had earlier warned Daley, Petitioner did run for the presidency of the Local in 1968 and campaigned actively against Daley when the latter sought re-election as Local business agent. (RT 669.) Petitioner was narrowly defeated, but Daley was also defeated and Petitioner's two-year ordeal came finally to an end. (RT 667-670.)

B. Procedural Background

On April 17, 1969, Petitioner filed this action for damages against the United Brotherhood of Carpenters and Joiners, against Local 25 and the District Council, and against Local Business Agent E. G. Daley and certain other officials of Local 25 in the Superior Court for the County of Los Angeles, California. The relevant pleading herein is Petitioner's First Amended Complaint, which contains four causes of action. The first cause of action substantially pleaded a breach of the union's duty of fair representation. The second pleaded intentional infliction of emotional distress. The third pleaded fraudulent misrepresentation. The fourth pleaded breach of contract. (CT 102-114; App 1 - 16.)[6/] The Defendants demurred to all causes of action (CT 127-128; App 16 - 18) and their demurrer was sustained as to the first, third and fourth causes of action, without leave to amend. (CT 190; App 19.) The basis of this ruling was that the subject matter of these causes of action was pre-empted by the Labor-Management Relations Act.

6/ For the sake of convenience, all references to the Single Appendix required by Rule 36 of the Rules of this Court will be made by means of the abbreviation "App" followed by the appropriate page number.

Petitioner's action went to trial on the single remaining cause of action for intentional infliction of emotional distress. (RT 1.) On February 5, 1973, pursuant to a jury verdict, judgment was rendered on that remaining cause of action against Daley, Local 25 and the District Council in the amount of $7500 in compensatory damages and $175,000 in punitive damages. (CT 570-572; App 67 - 69.)[7/] All three appealed from the judgment (CT 645) and the Court of Appeal of the State of California, Second Appellate District, in a published opinion authored by Justice pro tempore Charles Loring, reversed. Although Respondents made a number of assignments of error, the sole basis for that reversal was that Petitioner's action was pre-empted by the Labor-Management Relations Act. (See Appendix A to Petition for Writ of Certiorari.)

A timely petition for hearing in the Supreme Court of the State of California was denied on September 10, 1975. (See Appendix B to Petition for Writ of Certiorari.)

7/ Judgment was never entered with respect to the other causes of action. Their present status is a matter of continuing dispute, but that fact does not affect this Petition.

SUMMARY OF ARGUMENT

Petitioner submits that the doctrine of pre-emption has been misapplied to this case, and that his substantial rights have been needlessly sacrificed in order to avoid an essentially imaginary conflict between federal labor law and California's law of torts.

It is uncertain to what extent the bulk of the misconduct on which this action is based is subject or arguably subject to the Labor-Management Relations Act and thus comes within the operation of the pre-emption principle announced in San Diego Building Trades Council v. Garmon, supra, 359 U.S. 236. To the extent that it is subject at all to federal labor relations law, the misconduct on one hand has only the slightest imaginable impact upon the process of employee self-organization and collective bargaining which the Labor-Management Relations Act was designed to promote. On the other hand, it vitally affects California's significant interest in the well-being of its citizens. For that reason, the misconduct falls within exceptions to the pre-emption principle recognized in International Association of Machinists v. Gonzales, 356 U.S 617 (1958) and Linn v. Plant Guard Workers, 383 U.S. 53 (1966). Moreover, the misconduct clearly involves breaches of the union's duty to fairly represent each of its members and of the standards of fair discipline set forth in the Labor Management Reporting and Disclosure Act of 1959, and may

therefore be made the subject of an action at law even if it also incidentally violates the provisions of the Labor-Management Relations Act.

If the decision below in fact represents a correct application of the pre-emption doctrine as it now exists, Petitioner submits that serious reconsideration of that doctrine is in order. Indeed, the pre-emption doctrine as it has developed in the law of labor relations is unclear, uncertain in its application, and frequently productive of manifest injustices, and it is but poorly promotive of the purposes it is intended to serve. The instant action, if its subject matter is in fact pre-empted, illustrates as well as any case could the deficiencies of the pre-emption principle as it is now formulated. If this Court is moved by the obvious insufficiencies of the present rule to undertake a re-examination thereof, at least two alternative approaches are possible. On one hand, the Court might simply abandon the Garmon principle insofar as it presently applies to disputes between union members and their unions, thus reopening to the states a field which Congress never really meant to occupy when it enacted the Labor-Management Relations Act. On the other hand, Garmon might be abandoned in its totality and replaced with a different and less capricious principle. A principle far better adapted to the resolution of labor pre-emption issues, whether those issues arise in the context of ordinary labor disputes between employers and unions or in the context of member-union disputes is that suggested in this Court's decision in Teamsters Local 20 v. Morton, 377 U.S. 252

(1964). Under a Morton approach, if Congress focussed upon the conduct in question but in weighing the interests of the public, employers, individual workmen and organized labor, decided either to regulate that conduct or to leave it free of all regulation, a state could not itself regulate that conduct on the basis of its own reweighing of the same interests; however, if the conduct were not actually protected by federal law, a state might nonetheless legitimately reach it with laws of general applicability not intended to regulate labor relations as such. Under either approach, the law would be rendered substantially more just and reasonable in its operation and far simpler to administer.

ARGUMENT

I. STATE REGULATION OF THE MISCONDUCT COMPLAINED OF HERE INVOLVES FEW OF THE RISKS WHICH THE PRE-EMPTION PRINCIPLE ANNOUNCED IN GARMON WAS DESIGNED TO AVOID

A. The Extent of Federal Pre-emption of State Power to Deal With the Misconduct Complained of Herein Depends on the Nature and Extent of Congress' Objectives in Enacting the Labor-Management Relations Act

1. The Pre-emption Principle

a. The doctrine of pre-emption as it is applied in the law of labor relations is in actuality a marriage of two separate but similar concepts.

(1) On one hand, the doctrine is an application of the traditional principle of

pre-emption. Congressional power over labor relations stems from the interstate commerce clause of the Constitution (U.S. Const. Art. 1 § 8; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The term pre-emption suggests federal displacement of state power over interstate commerce, and thus over labor relations, in one of two ways. First, as indicated in Cooley v. Board of Wardens 53 U.S. (12 How.) 299, 319-32 (1851) some aspects of interstate commerce are so demanding of uniform national regulation that their regulation must be by a single authority, and under the supremacy clause (U.S. Const. Art. 6) that authority can only be Congress. Second, where state authority is not pre-empted by the bare constitutional grant of power to Congress, state power may still be displaced by legislation which, through the supremacy clause, pre-empts some or all of the field. (See Note, Federal Pre-emption in Labor Relations 63 Nw. U.L. Rev. 128, 129-130 (1968).) Labor relations is not one of the aspects of interstate commerce deemed directly foreclosed to the states by the Constitution, and to the extent that state power is excluded from the field this is the result of Congress' enactment of national labor legislation. (Id.)

As this Court has several times observed (Motor Coach Employees v. Lockridge, 403 U. S. 274, 286 (1971); Linn v. Plant Guard Workers, supra, 383 U.S. 53, 58-59; International Association of Machinists v. Gonzales, supra,

356 U.S. 617, 619; Garner v. Teamsters Local 776, 346 U.S. 485, 488 (1954)) determination of Congressional intent as to the pre-emptive effect of the Labor-Management Relations Act is necessarily a matter of inference from the terms of the Act and the circumstances surrounding its enactment, since with one or two minor exceptions[8/] the Act contains no provisions directly addressing the pre-emption issue.

(2) On the other hand, the pre-emption doctrine as applied to labor relations law also embraces a principle of primary jurisdiction, the courts having reasoned that since under Section 10 of the Labor-Management Relations Act (29 U.S.C. § 160) the Labor Board alone is expressly vested with the authority to interpret and enforce the provisions of the Act, subject only to limited review by the courts, Congress intended to bar the exercise of concurrent jurisdiction over unfair labor practices by the courts. (Garner v. Teamsters Local 776, supra, 346 U.S. 485, 490-491; Bryson, A Matter of Wooden Logic: Labor Law Pre-emption and Individual Rights, 51 Tex. L. Rev. 1037, 1038-1039 (1973).) The principle of primary jurisdiction rests on a theoretical foundation similar to that of true pre-emption: To confer concurrent jurisdiction upon the courts risks fragmentation, inconsistency and conflict where a unitary policy is desirable or

---

8/ See Sections 14(b) and 14(c) (29 U.S.C. §§ 164(b) and 164(c)).

necessary. (See Garner v. Teamsters Local 776, supra, 346 U.S., at pp. 490-491; see also Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1341-1345 (1972).) This concept obviously precludes both state and federal courts from attempting to enforce the provisions of the Act. Moreover, because the supremacy clause has no effect upon competing schemes of federal law, the notion of primary jurisdiction or something quite like it, is evidently the basis upon which courts are precluded from applying other federal law to conduct which is subject to the Act, except of course where Congress cannot be said to have intended the Act to be the exclusive body of law applicable to the particular conduct involved. (See Boilermakers v. Hardeman, 401 U.S. 233, 237-241 (1971); Vaca v. Sipes, 386 U.S. 171, 176-183 (1967).)

Because the determinative consideration is the intent of Congress whichever notion is involved, Petitioner now turns to an examination of that intent.

2. Purpose and Scope of the Labor-Management Relations Act

a. As originally enacted, the National Labor Relations Act of 1935 (49 Stat. 449, 29 U.S.C. §§ 151, et seq.) regulated the conduct of employers only and affected labor organizations only to the extent that they found shelter beneath its protective wing. In 1947, however, Congress enacted the Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. §§ 141, et seq.), popularly known as the Taft-Hartley Act, in order for the first time to bring the conduct of the unions within the ambit of federal labor relations law.

The new provisions added by the Taft-Hartley legislation to regulate union conduct covered a number of subjects, but in keeping with Congress' declared purpose of establishing an orderly and nationally uniform process for employee self-organization and for the initation and maintenance of collective bargaining between organized employees and their employers (29 U.S.C. §§ 141, 151) most of the new provisions clearly dealt (as did the employer provisions of the original National Labor Relations Act) with acts directly impinging on that process. Most of the new provisions concerned union conduct directed at employers. (See Sections 8(b)(1)(B); 8(b)(3); 8(b)(4)(A), (B), (C) and (D); 8(b)(6).) Only three -- Sections 8(b)(1)(A), 8(b)(2) and

8(b)(5) -- concerned union conduct aimed specifically at individuals. Of these only the first two are relevant here.

Section 8(b(1)(A) made it an unfair labor practice for a labor organization or its agents to "restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right of the labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;..."

Section 8(b)(2) made it an unfair labor practice "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;..."

Because this case turns in large measure on the meaning and applicability of the two sections just quoted, an understanding of what Congress intended by the provisions is essential. Of particular concern is the extent to which Congress meant in enacting these provisions to go beyond its declared purpose and to regulate conduct essentially unrelated to employee self-organization and collective bargaining. This may be best determined by reference to the legislative history of the Taft-Hartley legislation

and to subsequent legislation enacted to reach matters which Congress recognized it had not covered in the original legislation.

b. The Taft-Hartley legislation grew out of a groundswell of public indignation over what were felt to be flagrant abuses of the freedom from regulation which labor organizations enjoyed under the National Labor Relations Act. Among the abuses singled out by the critics of the National Labor Relations Act were union intimidation, coercion and even violence in persuading unorganized workers to join unions. Another issue which provoked heated debate was whether and to what extent workers who were not members of labor organizations should be protected in their efforts to obtain and hold jobs in heavily unionized industries. Not surprisingly these concerns figured prominently in the legislative proposals and Congressional debate from which the Labor-Management Relations Act ultimately emerged.

(1) Section 8(b)(1)(A) was Congress' specific response to organizational coercion. As is detailed in NLRB v. Drivers Local No. 639, 362 U.S. 274, 285-290 (1960), Section 8(b)(1)(A) was added to Senate Bill 1126 (which ultimately became the Labor-Management Relations Act) by amendment on the floor of the Senate after the bill was reported out of committee.[9/] (1 NLRB, Leg.

9/ The idea underlying Section 8(b)(1)(A) first appears in the legislative history in Senate Report No. 105

(Con't p. 23)

Hist. LMRA, pp. 1018-1033; 1139-1145, 1183, 1192-1209, 1216-1217.)

The debate and committee reports indicate that both proponents and opponents of the provision clearly understood that its primary target was the adverse effect of tactics of intimidation upon the organizational process. (1 NLRB, Leg. Hist. of LMRA, pp. 456, 546, 647, 891; 2 NLRB op cit., pp. 1018-1021, 1023-1027, 1029-1030, 1192-1209.) To the extent that Section 8(b)(1)(A) may be construed to apply to union coercion other than attempts to compel non-members to join a union -- that is, to coercion directed at workmen already belonging to the union -- the legislative history indicates that this construction either was not intended at all (see 2 NLRB, Leg. Hist. of LMRA, pp. 1200, 1202-1203, 1204-1205) or if intended, was at most a secondary or incidental construction not deemed particularly important to the achievement of Congress' main objective of protecting individual freedom of choice during organizational campaigns (see 2 NLRB, Leg. Hist. of LMRA, pp. 1028-1031; see also NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 179-195 (1967)). How

---

9/ (con't) on S. 1128, Supplemental Views of Senators' Taft, Ball, Donnell and Jenner. (1 NLRB, Leg. Hist. of LMRA, p. 456.) The report and the Senate debates indicate that this provision was among those proposed but rejected while S. 1126 still in committee. (2 NLRB, Leg. Hist. of LMRA, p. 1204.)

little concerned Congress was with union conduct toward workmen already organized is perhaps most clearly revealed by the addition to the original section of the proviso that the section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The announced purpose of the proviso was to allay the fears of the opponents of the section that it might be used to reach what were called "internal union affairs," by which was meant matters customarily governed by internal union rules, such as membership qualifications, the organization and and structure of the union, the nature of the relationship between union members and their union and the grounds and procedures for imposing discipline upon members.10/ (2 Leg. Hist. of

---

10/

A number of decisions by this Court reflect the distinction Congress sought to draw between coercion directed at non-members and coercion practiced by a union upon its own members by way of internal discipline. Thus in NLRB v. Allis-Chalmers Mfg. Co., supra, 388 U.S. 175, this Court held union enforcement of a fine imposed upon a member for crossing a picket line did not constitute "coercion" within the meaning of Section 8(b)(1)(A) since Congress in enacting the section did not intend to regulate union discipline. (See also NLRB v. Boeing Co., 412 U.S. 67 (1973); Scofield v. NLRB, 394 U.S. 423 (1969).) On the other hand, attempted enforcement of fines imposed upon former union

(Con't p. 25)

LMRA, pp. 1138-1142; see also NLRB v. Allis-Chalmers Mfg. Co., supra, 388 U.S., at p. 182-183.)

(2) The legislative history of Section 8(b)(2) is somewhat less clear than that of Section 8(b)(1)(A), but it does reveal that Section 8(b)(2) was intended primarily as part of Taft-Hartley's resolution of the "union security" versus "right to work" controversy.

In order to insure the right of workers not belonging to a union to obtain employment in organized industries while recognizing the right of organized workers to demand at the same time a fair measure of support for their union from all who benefit from the union's efforts as bargaining agent, Taft-Hartley banned "closed shop" arrangements, under which an employer would hire only union members, but authorized "union shop" arrangements, whereby an

---

10/ (con't)
members who quit the union and then crossed picket lines has been held coercion within the meaning of the section. (Booster Lodge 405, International Assn. of Machinists v. NLRB, 412 U.S. 84 (1973); NLRB v. Granite State Joint Board, 409 U.S. 213 (1972).)

As will be seen below (see Section II B 2, infra), this distinction parallels a distinction appearing in the common law of unincorporated associations developed in the state courts. Such state law provided far greater protections to union members subjected to mistreatment by their unions than it did to non-members.

employer could agree with a union to require any non-member hired by him to join the union, at least to the extent of paying dues, as a condition of continuing employment (§§ 8(a)(3)[11] and 8(b)(2); 1 NLRB, Leg. Hist. of LMRA, pp. 411-413, 1420.)

11/ Section 8(a)(3) provides in pertinent part as follows: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, ...: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ."

That portion of Section 8(b)(2) which most obviously bears upon closed shop arrangements is the first clause, the effect of which is to forbid union attempts to cause an employer to discriminate against an employee in regard to hire, tenure or any other terms or conditions of employment for the purpose of encouraging union membership, except to the extent that the discrimination is permitted by the union shop provisions of Section 8(a)(3). The legislative history suggest no purpose other than the obvious one of precluding a union from urging upon an employer a closed shop arrangement to which the employer could not agree without committing an unfair labor practice. (1 NLRB, Leg. Hist. of LMRA, pp. 411-413, 1010.)

The purpose of the second clause is less clear. On one hand, it is quite evidently intended to prevent what is ostensibly a union shop from being turned into a de facto closed shop through the union's systematic denial of membership to non-members hired by the employer or through systematic expulsion of such non-members, once admitted. The legislative history, including the remarks of Senator Taft, the sponsor of the Senate bill, suggests that this was in fact its main purpose. (1 NLRB, Leg. Hist. of LMRA, pp. 1010, 1040, 1096-1097, 1420-1421.)

On the other hand, in preventing a union from causing an employer to discharge a worker expelled from the union for anything but nonpayment

of dues, the section goes well beyond bare prohibition of the closed shop, as the opponents of the proposed legislation were quick to point out. (See 2 NLRB, Leg. Hist. of LMRA, pp. 1040, 1578.) That is, its effect ceases to be solely to provide non-members with equal access to the job market and becomes at least in part to preclude a union from causing an employer to impose upon a member the ultimate sanction -- expulsion from the bargaining unit as well as from the union -- whether for the best or worst of internal union reasons.

The legislative history does suggest that this second meaning was intended by Congress. The bill's proponents adverted at several points to cases in which members had been expelled and then fired from their jobs under closed shop agreements in reprisal for offending union leadership and stated that while the section would not prevent expulsion from the union, it would preclude discharge of the member from his job under even a permissible union shop arrangement. (2 NLRB, Leg. Hist. of LMRA, pp. 1010, 1094, 1096, 1141-1142, 1420, 1497, 1525.)

But it is noteworthy that all of the union abuses mentioned involved interference with existing job rights and none of the debate over the section focussed upon the possibility that the section might be construed to authorize the Board to police union conduct toward a member which fell short of causing actual discharge from a job which he already possessed. Specifically,

no one ever mentioned the possibility that the section might be applied to hiring hall discrimination practiced against a member and based upon his participation in internal union affairs. In light of the fact that the operation of the hiring hall was a matter of internal union rules for whose breach state law already provided the affected member a number of remedies (see Section II B 2, infra) and of the further fact that the bill's proponents so emphatically disclaimed any intention of regulating the relations between members and their unions, the silence of the legislative history leaves it open to question whether Congress in fact meant to give the Board this function, or if Congress did so intend, whether it regarded the function as a particularly significant aspect of the Board's overall responsibility.

c. How limited was Congress' concern with union conduct toward members is perhaps most clearly indicated by the provisions Congress did not enact rather than those it did enact. Included in the bill originally introduced in the House (H.R. 2030) were a number of provisions under which it would have been an unfair labor practice to impose initiation fees and dues or assessments in excess of amounts authorized by majority vote, to deny members the right to resign at any time from the organization, to compel participation in any insurance or benefit plan, to discipline any member for criticizing his union or any officer or for failing to support any candidate or proposition in a union election, to discipline or expel a member without an

opportunity to be heard or upon an improper ground, to fail to hold secret elections of union officers or to fail to submit to secret ballot issues of dues, assessments or strikes, to spy upon members or to threaten them or their families, or to fail to report union finances to members at least annually. (H.R. 3020, § 8(c), reproduced at 1 NLRB, Leg. Hist. of LMRA, pp. 344-345; see also p. 616.)

These provisions (which were referred to by H. R. 3020's sponsors and proponents as an employees' "Bill of Rights" (1 NLRB, Leg. Hist. of LMRA, pp. 322, 614-615, 639, 640) fell by the wayside in a manner which precludes any conclusive determination of Congress' reasons for abandoning them. The provisions survived the initial House deliberations and were part of the bill the House adopted and sent to the Senate. (1 NLRB, Leg. Hist. of LMRA, pp. 179-183, 863.) The provisions were never considered in the Senate, however, for just as the House bill reached the Senate, the Senate Committee on Labor and Public Welfare reported out its own bill. (1 NLRB, Leg. Hist. of LMRA, pp. 99-157; 2 NLRB, op. cit., pp. 1000-1001.) That bill contained no provisions equivalent to the mentioned provisions of the House bill, and since committee reports seldom dwell on matters not included in a bill, the Senate report is predictably silent as to why no such provisions are to be found in the Senate bill. There was little discussion in the course of the Senate's debate on the Senate bill of the issues raised by the provisions of the House bill here in question.

Ultimately, the Senate substituted the language of its own bill for that of the House bill (1 NLRB, Leg. Hist. of LMRA, p. 880; 2 NLRB, op. cit., pp. 1469-1470) and the House bill, as so modified, was adopted by the Senate. (2 NLRB, Leg. Hist. of LMRA, p. 1522.) The amended bill was approved essentially unchanged by the joint conferees. (1 NLRB, Leg. Hist. of LMRA, pp. 505 et seq.) The House conferees' report to the House makes no reference to the omitted provisions and the brief debate in the House prior to its adoption of the Senate's substitute measure is essentially silent with respect to them. (1 NLRB, Leg. Hist. of LMRA, pp. 505 et seq., 878-898.)

But if the record contains no direct expression of Congress' thinking on the omitted provisions, Congress' motives are nonetheless relatively clear. The House bill was regarded by some legislators as unnecessarily "punitive" (see, e.g., 1 NLRB, leg. Hist. of LMRA, pp. 603-605, 864-865). There can be little question that the Senate bill was deliberately made less severe in order to draw as much support as possible to override an anticipated veto by President Truman, or that, the primary objective of controlling union conduct toward employers and unorganized workers having been achieved by the Senate bill, the House, with some reluctance but in apparent recognition of the difficulty of obtaining Senate agreement to the House provisions, not to mention sufficient votes for an override, simply left the internal union affairs at which the "Bill of Rights" was clearly directed for future legislation. (See 1 NLRB, Leg. Hist.

of LMRA, pp. 871-898.)

d. Another indication of what Congress intended when it enacted the Labor-Management Relations Act may be found in Congress' subsequent enactment of the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 519; 229 U.S.C. 401 et seq.), commonly referred to as the Landrum-Griffin Act.

The result of a series of hearings into union racketeering and corruption before the Senate Select Committee on Improper Activities in the Labor or Management Field (known popularly as the McClellan Committee) the Landrum-Griffin Act established requirement of periodic reports by unions of union finances and internal affairs and by employers engaging in labor related activities (Title II), set severe limits on union use of trusteeships in controlling the affairs of locals (Title III), imposed stringent regulations on the union election process (Title IV), and imposed fiduciary obligations upon union officials with respect to the fiscal management of unions (Title V). (See generally, Aaron, The Labor Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851 (1960); Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich.L.Rev. 819 (1960).)

Recognizing that "it was imperative that all union members be guaranteed at least 'minimum standards of democratic process . . .'" (Hall v. Cole, 412 U.S. 1, 7 (1973)) Congress also included as Title I of the Act a "Bill of Rights of Members

of Labor Organizations." Section 101 of Title I (27 U.S.C. § 411) guaranteed union members the equal right to full participation in their unions' internal political processes (Section 101(a)(1)), freedom of speech and assembly (Section 101(a)(2)), protection against arbitrary dues increases (Section 101(a)(3)), protection of the right to file lawsuits against the union or to testify in legislative, administrative or judicial proceedings (Section 101(a)(4)), and procedural due process in the imposition of union discipline (Section 101(a)(5)). Section 102 of Title I allowed any person whose rights "have been infringed by any violation of this Title [to] bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate." (29 U.S.C. § 412(a).) A closely related provision appeared in Title VI of the Act. Section 609 made it unlawful for any labor organization or agent, employee or representative thereof "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act" and specifically made Section 102 applicable to any such conduct. The meaning and application of these provisions will receive further treatment below, but what is significant here is that the provisions of the "Bill of Rights" closely resemble the provisions originally included in H.R. 3020 but not enacted as part of the Labor-Management Relations Act, and that the Labor-Management Relations Act only tangentially covered or did not cover at all the conduct which Congress ultimately reached in adopting Title I.

3. Early Labor Pre-emption Decisions

Proceeding on a case-by-case basis and describing its efforts as a "process of litigating elucidation" (International Association of Machinists v. Gonzales, supra, 356 U.S. 617, 619) this Court in its early pre-emption decisions frequently undertook a careful examination of the respective purposes and effects of federal labor relations law and of the rules of state law asserted to be in conflict therewith, and revealed a willingness to accommodate federal interests to local interests. These decisions recognized the interest of the states in regulating some conduct which was neither protected nor prohibited by federal labor relations law (see United Automobile Workers v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949); Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942)) and, indeed, even some conduct actually regulated by federal law, where the conduct was prohibited by federal law and the remedies under state law were different from federal remedies (United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954)). The Court also recognized the right of individuals to seek judicial redress for harms resulting from conduct which, although occurring in an industrial setting, lay outside the Labor Board's primary area of responsibility and for which federal law provided inadequate

remedies (International Association of Machnists v. Gonzales, supra, 356 U.S. 516; United Auto Workers v. Russell, 356 U.S. 634 (1958)). The Court seemed more inclined to bar state intervention when a local tribunal sought to apply a rule of state law intended specifically to regulate labor relations as such, even if the local rule was similar or identical to a rule of federal labor law and even if the Board had declined to exercise jurisdiction over the dispute in question. (See Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957); Garner v. Teamsters Local 776, supra, 346 U.S. 485; Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767 (1947).) Predictably, when state law, whether applicable generally or whether intended specifically to regulate labor relations, attempted to prohibit or burden conduct which Congress had wished to protect, the invariable conclusion was that such law invaded a field from which all local authority had been excluded. (Teamsters Union v. Oliver, 388 U.S. 283 (1959); Bus Employees v. Wisconsin Board, 340 U.S. 383 (1951); United Automobile Workers v. O'Brien, 339 U.S. 454 (1950); Hill v. Florida, 325 U.S. 538 (1945).) The same conclusion, perhaps less predictably, was reached in some cases where the conduct might be either protected or prohibited, the Court professing an unwillingness to make a judgment it believed should be made by the Board. (Teamsters Union v. New York etc. Railroad Co.,

350 U.S. 155 (1956); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).)

4. The Garmon Principle

Precisely because they were the product of an ad hoc process, the early decisions failed to produce a single, simple and universally applicable pre-emption test, and ultimately, in San Diego Building Trades Council v. Garmon, supra, 359 U.S. 236, this Court abandoned the case-by-case approach and announced a more sweeping formulation of the pre-emption doctrine. While adverting in very general terms to the dangers against which the principles of pre-emption and primary jurisdiction are intended to protect the federal scheme of labor relation law, the Garmon Court focussed not at all upon the extent to which those dangers might be present in the case before it. The Court's express concern was instead "classes of situations" and "areas of potential conflict" (359 U.S. at p. 242). With that concern in mind, the Court fashioned a general rule which could be applied by the lower courts in all cases without weighing conflicting policy considerations, the Court's evident intent being to enable the lower courts to police the uneasy frontiers between federal and state power and between administrative and judicial jurisdiction, without the need for constant supervision by this Court. (See Motor Coach Employees v. Lockridge, supra, 403 U.S. 274, 289-290.)

The Garmon test is simply stated. Under that test, conduct actually or arguably subject to the Labor-Management Relations Act -- that is, actually or arguably prohibited by Section 8 or actually or arguably protected by Section 7 -- may not be regulated by the states and lies within the exclusive jurisdiction of the Labor Board (359 U.S. at p. 244.) Theoretically at least, the application of the test is simple, too. What determines whether a particular lawsuit is pre-empted under the Garmon principle is not the form of the action -- that is, whether it sounds in tort or in contract or whether it purports to depend on state law of general applicability instead of state law which attempts specifically to regulate labor relations -- but rather the nature of the conduct itself. If the "crux" of the lawsuit is conduct arguably regulated by the Labor-Management Relations Act and subject to the Board's jurisdiction, the courts are without power to entertain it. (Plumbers Union v. Borden, 373 U.S. 690, 697-698 (1963).)

Garmon involved application by a state of local labor relations law to award an employer damages for peaceful organizational or recognitional picketing by the defendant labor organization, conduct which was in all probability lawful under then existing federal law (see NLRB v. Drivers Local 639, supra, 362 U.S. 274) but which the state court unaccountably found was prohibited under Section 8(b)(2). This Court, applying the test set out above, reversed the judgment. As pointed out by Mr. Justice Harlan in his concurring opinion in Garmon, the same

result would have followed had the Court applied the established principle that state prohibition of federally protected conduct is clearly impermissible under the supremacy clause. (359 U.S. at pp. 249, et seq.; see also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Cox, Labor Law Preemption Revisited, supra, 85 Harv. L. Rev. 1337, 1341.

Garmon was thus an easy case, and the new principle, at least as applied to Garmon's facts, produced an unquestionably proper result. Whether in other essentially dissimilar contexts it does the same is explored in the sections which follow.

B. There Is No Significant Conflict Between the Objectives of the Labor-Management Relations Act and California's Law of Torts.

To the extent that this case may come within the literal terms of the Garmon principle, it does so in a way which involves the dangers contemplated by Garmon in the most indirect sense possible.

1. Preliminary Considerations

Some preliminary observations are in order before turning to Garmon and its applicability hereto.

In the first place, this case is unlike the usual action against a union by a member in that the misconduct complained of was not a single act but rather embraced a series of acts of varying character occurring over a period of more than two years. This fact makes it somewhat more difficult to determine where the "crux" of the action lies than in the previous cases decided by this Court under the Garmon principle, but logically, the "crux" of the action should be determined by examination of the overall character of the misconduct, rather than by fixing

upon isolated instances of misconduct. Moreover the Act proscribes only that conduct whose real motive or true purpose is related to union considerations and then only to the extent that Congress actually focussed upon that conduct as inimical to the process of employee self-organization and collective bargaining. (NLRB v. Allis-Chalmers Mfg. Co., supra, 388 U.S. 175, 184-195; American Ship Building Co. v. NLRB, 380 U.S. 300, 311 (1965); Local 357, International Brotherhood of Teamsters v. NLRB, 365 U.S. 667, 675-676 (1961); NLRB v. Drivers Local Union No. 639, supra, 362 U.S. 274, 284-290; Radio Officers v. NLRB, 347 U.S. 17, 42-43 (1954).) For that reason, whether the conduct which forms the "crux" of the action is within the scope of the Act depends both upon Congress' actual intent when it enacted a provision which might seem to extend to such conduct and, if Congress meant to reach such conduct, upon the motivation underlying the conduct.

In the second place, Petitioner has not sought judicial interpretation or application of the provisions of the Labor-Management Relations Act, so that the Labor Board's role as the primary arbiter of national labor policy is not directly involved here. Nor has Petitioner invoked a rule of state law aimed specifically at the regulation of labor relations, so that the problem of competing schemes of labor relations law is not involved here either. (See Hardeman v. Boilermakers, supra, 401 U.S. 233, 240-241.) The conflict here, to the extent there is one, is between a local rule of tort law which applies generally and which does not purport to regulate

union misconduct as such, and a scheme of federal law narrowly focussed upon the process of employee self-organization and collective bargaining.

2. Application of Garmon

It would appear as a matter of simple common sense that the chances of any substantial conflict between federal labor policy as declared by the Act and enforced by the Labor Board and California's policy of protecting its citizens from the intentional infliction of grievous mental distress should be slight indeed. This common sense conclusion receives substantial support from a careful analysis of the Garmon principle as it applies to the facts of this case.

a. To begin with, it is clear beyond cavil that the misconduct herein was not protected under Section 7 of the Labor-Management Relations Act. At no stage of this litigation have the Respondents suggested it was even arguably protected, nor have they cited any authority which would in any way support that position.

(1) If the union's conduct were clearly protected -- that is, if on the basis of undisputed facts and clear precedent reasonable men could not differ as to its protected character -- there would, of course exist an immediate and direct conflict between the standards of

behavior prescribed by the Act and applied by the Board and the standards of behavior prescribed by California's law of torts and applied by California's courts. To countenance any such conflict in standards of behavior would unquestionably frustrate implementation of the national labor policy, in violation of the supremacy clause. Moreover, where state law purported to regulate labor relations as such (a consideration which, as already indicated, is not involved here) to permit such a conflict would result in Balkanization of the law of labor relations, in derogation of the uniformity of regulation apparently envisaged by Congress.

(2) Even if the conduct were only arguably protected, there would still theoretically exist the possibility of a direct conflict in substantive standards of behavior of the sort just described if the states sought to prohibit or control that conduct. And, even though the state legislatures and the courts were to take the trouble to satisfy themselves that the conduct was not actually protected before enacting or enforcing state laws regulating it, they would in a sense invade the Board's role as primary interpreter of the Act in so determining.

Nonetheless, as Justices Douglas and White pointed out in their dissenting opinions in Motor Coach Employees v. Lockridge, supra, 403 U.S. 305, 331 et seq., when a court declines to decide whether conduct is actually protected and dismisses an action because it might be protected the controversy is placed in a state of juridical

limbo, since there is no way the plaintiff can obtain a declaratory ruling from the Board indicating whether the conduct is or is not protected. (See also the concurring opinion of Mr. Justice White in Longshoremen v. Ariadne Shipping Co., 317 U.S. 195 at p. 201 (1970); Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon, 72 Col. L. Rev. 469, 473 (1972).) In the face of the manifest injustice of denying an aggrieved party any determination of his claim, the mere risk of an incorrect assessment of what the Board would say if the question could be put to the Board at all may well be regarded as relatively insignificant. (See Cox, Labor Law Preemption Revisited, supra, 85 Harv. L. Rev. 1337 at p. 1342.)

b. It being obvious that Respondents' conduct was neither actually nor arguably protected under Section 7, the Garmon rule, to the extent that it applies at all, must apply because their conduct violated or arguably violated Section 8(b) of the Act.

(1) If conduct clearly violates Section 8 -- that is, if it is conduct as to whose prohibited character no reasonable disagreement is possible -- to allow the states to forbid it or regulate it cannot result in the direct conflict between inconsistent standards of behavior which renders impermissible state prohibition of protected conduct. The conflict in such situations is nothing more than a difference in remedies available from the respective tribunals.

How serious is this difference in remedies depends on several factors. Professor Archibald Cox has argued that Congress' specification of limited administrative remedies for all but a few unfair labor practices (see §§ 10(b) and 303 of the Labor-Management Relations Act (29 U.S.C. §§ 160(b) and 187)) implies rejection of other remedies for such conduct and a policy determination that administrative remedies are more suited than the usual legal remedies to the sensitive problems of union-employer relations. Professor Cox suggests that if employers and unions may obtain different and by hypothesis stronger remedies from the courts, at least where such remedies are provided by state laws regulating labor relations as such, the delicate balance which federal labor policy has struck between the interests of employers and those of unions will be disturbed. (Cox, Labor Law Preemption Revisited, supra, 85 Harv. L. Rev. 1337, 1343; see also Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon, supra, 72 Col. L. Rev. 469, 475-476; Garner v. Teamsters Local 776, supra, 346 U.S. 485, at pp. 498-500.)

Professor Cox' analysis has clear and undeniable merit, because if lawsuits and legal remedies come to replace administrative procedures and remedies in ordinary labor disputes, the nature of the process Congress institutionalized in enacting the national labor legislation will be greatly altered and the balance of power between

union and employer possibly upset.[12]/

This analysis is inapplicable to member-union suits. Actions by members against their unions can hardly affect to any appreciable extent the process Congress established to regulate the conduct of unions and employers toward each other, since the main combatants will still be relegated to the same economic weaponry and narrow administrative remedies, and the ability of either to carry on the battle will remain unimpaired. It is to be noted that both Congress and the courts have found the likelihood of any adverse impact upon the federal scheme of labor relations law slight in this limited area. This is evidenced not only by their creation of exceptions to the pre-emption doctrine for member suits founded on a union's breach of its duty of

---

12/ Differences between state and Board remedies transcend the form of the relief given. One further difference is timing, it being usually quicker to obtain a state temporary restraining order than to await the Regional Director's application for an injunction under Section 10(l) (29 U.S.C. §160(l)). Another is control over the litigation. Decisions about whether to initiate litigation at all and what course it shall take may well differ depending on whether a party to the dispute or the Regional Director is making them. (See Cox, Labor Law Preemption Revisited, supra, 85 Harv. L. Rev. at pp. 1342-1343.)

fair representation or upon improper union discipline but by the fact that both compensatory damages (including damages for mental suffering) and punitive damages have been allowed under both of these exceptions, even for conduct which clearly constitutes a clear unfair labor practice. (See Sections II C 1 and II C 2, infra.)

Moreover, considering the question from a common sense point of view, the effect upon the federal scheme when a court awards an individual compensatory or even punitive damages for union misconduct which both the Labor-Management Relations Act and state law of general application concur in prohibiting is far more likely to be favorable than otherwise. The central objective of the Act's remedial provisions is obviously to halt unfair labor practices and to prevent their recurrence. This is accomplished primarily by cease and desist orders and to some extent by any awards of back pay which may be made to individual workers harmed by the unfair labor practices. (See § 10(c).) Awards by courts of compensatory damages have a deterrent effect essentially equivalent to that of back pay awards. In purpose and effect, awards of punitive damages more nearly parallel cease and desist orders. If perhaps more drastic, such awards are also more effective; the threat of such an award will tend to a greater extent than a threat of a cease and desist order to prevent misconduct in the first place and, once imposed, such an award will operate, no less than a cease and desist order, as a deterrent to like conduct

in the future.[13]

(2) An element of complication is a added if the conduct is only arguably prohibited by Section 8. The evident intent of the "arguably prohibited" portion of the Garmon test is (1) to leave to the Labor Board, with its special expertise, the power to determine whether certain borderline varieties of conduct are helpful or harmful to the objectives of the Act and thus whether they should be prohibited or not, and (2) to allow the Board in effect to protect or permit such conduct by simply not regulating it.[14] When conduct is arguably subject to Section 8 in this sense, there exists a chance that as diligently as a court may to try to imitate the Board's reasoning on labor issues, the court will reach a conclusion different from the Board's and will mistakenly prohibit conduct which the Board, in its wisdom, would have left untouched. (See Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon, supra, 72 Col. L. Rev. 469, 477-478.) Thus the reasons underlying this portion of the Garmon test essentially parallel those underlying the "arguably protected" portion of the test.

13/ The subject of legal remedies will receive further treatment below. (See Sections II C 1 and II C 2, infra.)

14/ As to "permitted" conduct, see Section I B 2 d, infra.

(3) But there is some conduct which may be arguably prohibited by Section 8 without there being any shadow of a doubt that if it is in fact not prohibited by the Act, it is still inimical to the Act's objectives and would be proscribed by the Board if it thought it had the power. The issue in cases of this sort is whether Section 8 gives the Board the authority to act at all, not whether (assuming the Board does have such authority) it would regard the conduct as protected or permitted instead of prohibited. There may occur a slight risk of the kind of divergent remedies discussed above in connection with clearly prohibited conduct when a court awards a member damages for union misconduct which the Board might well prohibit but for doubts about its own authority to reach the conduct at all. But the bare risk of divergent remedies constitutes an even less direct interference with the effectuation of federal labor policy than occurs when conduct which is clearly prohibited under Section 8 is the subject of an award of legal remedies by a court of law. This risk can hardly be deemed significant when compared with the possibility that the aggrieved party will be left altogether without a forum if a court declines to decide a controversy which the Board would very possibly regard as outside its authority. (See dissent of Mr. Justice Douglas in Motor Coach Employees v. Lockridge, supra, 403 U.S. at pp. 304-305.)

c. It should be obvious into which of the above categories of clearly or arguably prohibited conduct the misconduct herein falls. The record reveals one instance of conduct for which the Board did provide at least a partial remedy, in the form of back pay from a single job to which

Petitioner had been improperly denied a referral. Inasmuch as the Board has spoken on that conduct, it would appear to fall within the category of clearly prohibited conduct. To the extent that the remainder of the conduct took the form of referral discrimination and indisputably proceeded from a desire to inflict retribution upon Petitioner for his political opposition to Daley, that conduct also came within a line of Board decisions declaring it a violation of both Section 8(b)(1)(A) and Section 8(b)(2). (See e.g., Plumbers Local Union No. 137, 207 NLRB 359 (1973); Carpenters Local Union No. 22, United Brotherhood of Carpenters and Joiners, 195 NLRB 1 (1972); Hoisting and Portable Engineers Local 4, 189 NLRB 366 (1971); United Bhd. of Carpenters and Joiners, Local 1281, 152 NLRB 629 (1965).)

It is nonetheless significant with respect to the above portion of the subject misconduct that even though the Board has interpreted the Act as authorizing it to reach that conduct, and even though the bare language of the Act might provide some support for the Board's position, the legislative history does not. As the Court remarked in NLRB v. Allis-Chalmers Mfg. Co., supra, 388 U.S. 175, 179, labor legislation is peculiarly the product of legislative compromise of strongly held views and the Board risks error in disregarding the legislative history merely because a provision may seem even unambiguously to embrace conduct before it. It has been demonstrated above that Section 8(b)(1)(A) was intended by Congress specifically to regulate organizational coercion and not other forms of coercion, such

as coercion directed at members because of their participation in internal union affairs. (See Section I A 1 a, supra.) Moreover, Section 8(b)(2) was aimed essentially at the closed shop, and to the extent that its terms seemed to go beyond prohibition of the closed shop, its proponents indicated only that the section was intended to reach union attempts to cause termination of an expelled member from a job he already possessed. (Section I A 1 b, supra.) The result is that the conduct in question rather closely resembles conduct which is arguably prohibited in the second of the two senses discussed above. That is, it lies at the outermost periphery of the category of conduct the Board was empowered to prohibit and perhaps wholly outside the Board's authority.

It should be clear, moreover, that much of the misconduct, and perhaps the greater part of it, could hardly have been in mere reprisal for Petitioner's political opposition to Daley. Petitioner has found no case involving such a protracted and intensive campaign of mistreatment directed by a union official at a member. The conclusion which inescapably follows from both the duration of the misconduct and its vengeful character (the conduct, it will be recalled, encompassed not only job discrimination but a steady barrage of insults, threats and vituperation and at least one minor battery) is that even though the misconduct may have been triggered in the first instance by Petitioner's opposition to Daley, its primary motivation soon transcended intraunion politics and became personal hatred and spite, indulged in for their own sake. So

viewed, this portion of the conduct thus either fell outside Section 8 or was arguably prohibited only in the limited sense that although by no means protected or permitted by the Act, the conduct might lie within the Board's prohibitory power.

d. It should be added that just as the conduct in question is obviously not the kind of conduct to which Sections 7 and 8 are primarily addressed, so it is not the kind of conduct involvex in Teamsters Local 20 v. Morton, supra, 377 U.S. 242. There this Court recognized that conduct clearly not subject to the Act might still lie outside the regulatory power of the states if Congress, in deliberating upon the Act, necessarily focussed on the conduct but, in balancing the interests of employers, employees, unions and the public, decided to leave it unregulated by other state or federal law and subject to redress only through the victim's counter-use of his own economic weapons. Professor Cox denominates such conduct "permitted conduct" to differentiate it from conduct which the Board has the affirmative power to protect. (Cox, Labor Law Preemption Revisited, supra, 85 Harv. L.Rev. 1337, 1346; see also Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon, supra, 72 Col. L.Rev. 469, 477-478.) It can hardly be contended that Congress, if it focussed at all on the kind of egregious misconduct involved here, could have intended that that misconduct be subject to redress only by resort to such countervailing power as an individual worker might be able to bring to bear upon his union. (See dissent of Mr. Justice Douglas in Plumbers Union v. Borden, supra, 373 U.S. 690, at p. 700.)

II TO THE EXTENT THAT THIS CASE COMES WITHIN THE GARMON PRINCIPLE, IT ALSO COMES WITHIN ONE OR MORE RECOGNIZED EXCEPTIONS TO GARMON

A. Congress and the Courts Have Created a Number of Significant Exceptions to the Garmon Principle

The Garmon principle is so honeycombed with exceptions that its true scope can be understood only by reference to those exceptions.

So far as it is relevant here, exceptions to the basic Garmon principle are recognized (1) where the conduct in question directly affects vital local interests traditionally left to state regulation or is only peripherally related to the central purposes of the Labor-Management Relations Act (Linn v. Plant Guard Workers, supra, 383 U.S. 53; Automobile Workers v. Russell, supra, 356 U.S. 634; International Association of Machinists v. Gonzales, supra, 356 U.S. 617; United Construction Workers v. Laburnum Constructors Corp., supra, 347 U.S. 656); (2) where an employer or union has breached its duties to a worker arising from or concerning a labor

agreement (29 U.S.C. § 185; Smith v. Evening News Association, 371 U.S. 195 (1962); Buzzard v. Local Lodge 1040, International Assn. of Machinists, 480 F.2d 35 (9th Cir., 1973)); (3) where, without respect to any breach of a labor agreement, a union has violated its duty to fairly represent its members (Vaca v. Sipes, supra, 386 U.S. 171; Smith v. Sheet Metal Workers Local 25, 500 F. 741 (5th Cir. 1974)); and (4) where a union member has been subjected to union discipline in violation of the provisions of the Landrum-Griffin Act (29 U.S.C. §§ 411(a)(5), 412, 429; Hardeman v. Boilermakers, supra, 401 U.S. 233). In these situations an action at law may be brought in a state or federal court even though the conduct in question is actually or arguably subject to the provisions of the Labor-Management Relations Act and to the jurisdiction of the Labor Board.[15]

15/ Other exceptions to Garmon are recognized in the following situations: (1) where a union has violated Section 8(b)(4)'s prohibition against secondary boycotts, in which case the affected employer may sue under Section 303 of the Labor-Management Relations Act (29 U.S.C. § 187) for any damages sustained; (2) where a union has obtained an agency or union shop agreement in violation of a state law enacted under Section 14(b) of the Act, in which case a state court can entertain a suit to void the agreement (Retail Clerks v. Schermerhorn, 375 U.S. 96 (1963); (3) where a dispute involves a company whose impact upon

(con't p. 54)

B. This Case is Squarely Within the Exception for Matters of Only Peripheral Federal Concern but Vital Local Concern

In Garmon itself this Court specifically exempted from the operation of the pre-emption

15/ (con't)
interstate commerce falls below the Board's jurisdictional standards, in which case under Section 14(c) of the Act a local agency or court may assert jurisdiction (Radio & Television Technicians v. Broadcast Services of Mobil, Inc., 380 U.S. 255 (1965)); (4) where employer or union conduct violates Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-5, 2000e-6); (5) where the dispute is subject to arbitration under a collective bargaining agreement, in which case an action under Section 301 will lie to compel arbitration and the Board will decline jurisdiction until the arbitrator has rendered his decision, even then deferring to the arbitrator's decision unless it is clearly wrong (see concurring opinion of Mr. Justice White in Motor Coach Employees v. Lockridge, supra, 403 U.S., at pp. 310-313; Hooton, The Exceptional Garmon Doctrine, 26 Lab.L.J. 49, 54-57); (6) where the dispute involves a foreign-flag ship in an American harbor, in which case state courts are sometimes permitted to assume jurisdiction (Hooton, op. cit., at p. 61); and (7) where the conduct violates federal antitrust law, in which case the courts have jurisdiction notwithstanding the fact that it also amounts to an unfair labor practice (Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975)).

principle state regulation of activity of vital local concern and only peripherally involving basic purposes of the national labor legislation. The Garmon court expressed this exception as follows:

> "...When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the State from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor-Management Relations Act. See International Assn. of Machinists v. Gonzales, 356 U.S. 617. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the State of the power to act."
> (359 U.S. 243-244.)

1. Linn v. Plant Guard Workers

a. The primary application of the above described exception has been to situations involving actual or threatened public disorder (see United Auto Workers v. Russell, supra, 356 U.A. 634; United Construction Workers v. Laburnum Const. Corp., supra, 347 U.S. 659) to disputes characterized as involving internal union affairs (see International Association of Machinists v. Gonzales, supra, 356 U.S. 617) and to actions for libel (see Linn v. Plant Guard Workers, supra, 383 U.S. 53) but there is nothing in the cases which suggests that these were ever meant to be the only matters encompassed within the exception.

Indeed, much of this Court's discussion in Linn carries beyond mere defamation, as has been noted in several cases. (See concurring opinion of Chief Justice Burger in Taggart v. Weinacker's Inc., 397 U.S. 223, 228 (1971) [indicating Linn's applicability to civil trespass actions]; Sears, Roebuck & Co. v. San Diego Council of Carpenters, 52 Cal.App.3d 690, 125 Cal.Rptr. 245 (1975) (hg. granted December 29, 1975, by California Supreme Court; argued April 5, 1976 [civil trespass]; Breitegger v. Columbia Broadcasting System, 43 Cal.App.3d 283, 117 Cal.Rptr. 699 (1974) [wrongful interference with advantageous business relations]; Sheetmetal Workers v. Carter, 133 Ga.App. 872, 212 S.E. 645 (1975) [common law tort of conspiracy to deprive plaintiff of employment and to subject him to scorn and ridicule

among friends, associates and fellow employees].)

Linn suggests the following four-part test of general applicability to causes of action arising under state tort law: If (a) the conduct in question does not ipso facto constitute an unfair labor practice (383 U.S., at p. 63); if (b) the conduct affects compelling local interests (383 U.S., at pp. 63-64); if (c) the National Labor Relations Board and the courts are concerned with separate and severable consequences of the conduct and the remedies they provide are mutually exclusive (383 U.S., at pp. 63-64); and if (d) the conduct in question was reckless or intentional, as opposed to merely negligent, and caused actual damage (383 U.S., at pp. 64-66), a tort action may be brought under state law, notwithstanding an incidental violation of the Labor Management Relations Act.

b. The four-part test just described is more than satisfied here.

(1) In the first place, the bulk of the conduct involved here is not automatically an unfair labor practice. In fact, much of it is obviously not, only a small part of it (if any) is a clear unfair labor practice and the remainder may or may not amount to an unfair labor practice, depending upon the view taken of its primary motivation. (See Section I B 2 c, supra.)

(2) Secondly, the law of the state of California evidences a compelling local interest in the protection of California citizens from the intentional infliction of emotional distress. California law on this subject has two branches.

On one hand, California has long recognized the right to recover damages for the intentional and unreasonable infliction of mental distress which results in foreseeable physical injury to another. (Alcorn v. Anbro Engineering, Inc., 2 Cal. 3d 493, 497, 86 Cal. Rptr. 88, 468 P. 2d 216 (1970); State Rubbish, etc., Assn. v. Siliznoff, 38 Cal. 2d 330, 337, 240 P. 2d 282 (1952); Vargas v. Ruggiero, 197 Cal. App. 2d 709, 717-718, 17 Cal. Rptr. 568 (1962); Richardson v. Pridmore, 97 Cal. App. 2d 124, 130, 217 P. 2d 113 (1950); Bowden v. Speigel, Inc., 96 Cal. App. 2d 793, 794-795, 216 P. 2d 571 (1950); Emden v. Vitz, 88 Cal. App. 2d 313, 316-319; 198 P. 2d 696 (1948); see Rest. 2d Torts, § 312.) On the other hand, the courts of California have also acknowledged the right to recover damages for severe emotional distress alone, without consequent physical injury, in cases involving extreme and outrageous intentional invasions of the victim's mental and emotional tranquility. (State Rubbish, Etc., Assn. v. Siliznoff, supra, 38 Cal. 2d 330, 337, 240 P. 2d 282; Cornblith v. First Maintenance Supply Co., 268 Cal. App. 2d 564, 565, 74 Cal. Rptr. 216 (1968); Agostini v. Strycula, 231 Cal. App. 2d 804, 808, 42 Cal. Rptr. 314 (1965); Perati v. Atkinson, 213 Cal. App. 2d 472, 474, 28 Cal. Rptr. 898 (1963); see Rest. 2d Torts, § 46.) To qualify as outrageous, conduct must go so far beyond mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities that it can only be regarded as atrocious and utterly intolerable in a civilized community. (Alcorn v. Anbro Engineering, Int., supra, 2 Cal. 3d at p. 499, footnote 5, 85 Cal.

Rptr. 88, 468 P. 2d 216; Rest. 2d, Torts, § 46, comment d.)16/

The California decision of greatest significance here is Alcorn v. Anbro Engineering, Inc., supra. There, the plaintiff, who was a black employee of the defendant employer and a union shop steward, was fired for attempting to police the collective bargaining agreement and was subjected to ugly racial epithets in the process. The trial court sustained a demurrer to the plaintiff's action for damages based on allegations that the epithets had been used with the actual and malicious intent to cause, and that they had caused, severe emotional distress. In its strongest statement to date on the right of individuals in California to be free of such inexcusable invasions of their peace of mind, the California Supreme Court held that a cause of action had indeed been stated. Although the pre-emption issue seems not to have been raised in Alcorn, the case does unequivocally express California's intent to

---

16/

Doubtless the injury proved by Petitioner in this case would constitute an actionable wrong under either branch of the doctrine, since Petitioner did suffer nausea and gastrointestinal distress which actually required his hospitalization. (CT 534-537; App 43 - 46.]
But Petitioner alleged and sought to prove that the Respondents were guilty of outrageous conduct, and the jury was instructed on this theory alone. (CT 524, 525, 527, 528; App 38, 40.)

protect its citizens' fundamental interest in peace of mind and freedom from outrageous conduct, even in the often rough-and-tumble milieu of the blue collar worker.

(3) Thirdly, Sections 8(b)(1)(A) and 8(b)(2) are not primarily intended to protect individual workers. Rather, Congress' main concern was the effect of certain kinds of conduct upon the public interest in an orderly process of employee self-organization and collective bargaining. (See 29 U.S.C. §§ 141, 151.) This fact is reflected in the Act's failure to provide any but the scantiest remedies for the kind of harm done the individual by such misconduct, the Labor Board having the power at most to award lost wages to an employee who suffers mistreatment at the hands of his union. (See § 10(c).) It is also apparent from an examination of the Act's legislative history, which reveals not only that Congress declined to enact the employees' "Bill of Rights" originally proposed in H.R. 3020 but that Congress expressly disavowed any intention of reaching internal union affairs. (See Sections I A 1 b and c, supra.) It is further reflected in Congress' subsequent enactment of Title I of the Labor Management Reporting and Disclosure Act and in the legislative history of that Act, which reveals a keen sense of the limited purposes and effects of the Taft-Hartley amendments. (See Sections I A 1 d, supra, and II B 2, infra.)

The remedy applied here was completely distinct from the remedies available under the Labor-Management Relations Act and was

intended to redress a wholly distinct injury from that to which the Act's remedies are addressed. Petitioner not only did not seek back pay for the work he lost because of the union's misconduct toward him, but the jury was instructed that it could award no damages for the loss of work. (CT 530; App 41 .) The only harm for which Petitioner sought and was awarded damages was the injury to his interest in tranquility and peace of mind (CT 524, 525, 527, 528, 540; App 38, 40, 48-49), for which harm the Act provides no remedy whatever.

(4) Finally, the purposes of Linn's requirement of "actual malice" and actual damage are fully satisfied here.

While the requirement that "actual malice" be established has its source in and is peculiarly adapted to the law of defamation (see 383 U.S. at p. 65), the requirement may reasonably be construed as drawing a line between tortious conduct which is willful, reckless or intentional and conduct which is merely negligent. There can be no question that the outrageous misconduct which must be proved under California's law of torts before there can be any recovery for mental distress not resulting in physical injury qualifies as "actually malicious" under this standard.

Linn's requirement of actual damage also has its source in libel law. It is designed to preclude recovery on the basis of a mere presumption of damage, which many states indulge in cases involving certain kinds of libel.

(383 U.S. at pp. 58, footnote 2, 65-66.) The requirement may or may not have much applicability in actions not founded on libel, but assuming that it does, there can be little doubt that California's requirement of a showing of "grievous mental distress" goes well beyond a mere presumption of damage. For present purposes, California law defines "emotional distress" as "any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry." (Fletcher v. Western National Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); Rest. 2d Torts, § 46, comment j.) To qualify as "severe" such distress must transcend the "transient and trivial emotional distress that is a part of the price of living among people," and must be "of such substantial quantity and enduring quality that no reasonable man in a civilized society should be expected to endure it." (Ibid.) This sort of injury is no less real, if no more tangible, than the "general injury to reputation, consequent mental suffering, [and] alienation of associates" which Linn held sufficient to support a libel judgment (383 U.S., at p. 66); indeed, there is a remarkable correspondence between the terms California courts use to describe grievous emotional distress and Linn's description of actual damage.

c. It is not without significance that the court in Linn expressly authorized awards of punitive damages for unpre-empted torts, adverting to Laburnum and Russell as having likewise permitted such damages. (383 U.S. at

pp. 65-66.) The Court did so on the evident basis that the four-part test discussed above would provide adequate safeguards against any serious interference by such awards with the effectuation of national labor policy.

2. International Association of Machinists v. Gonzales

a. A second branch of the exception recognized in Garmon has its source in International Association of Machinists v. Gonzales, supra, 356 U.S. 617, which, it will be recalled, was characterized in Garmon as involving matters of peripheral federal concern. In Gonzales, a member's action in state court for reinstatement following expulsion from his union and for lost wages and physical and mental suffering was held not pre-empted by the Labor-Management Relations Act. The plaintiff in Gonzales was expelled from his union by reason of a dispute with union leaders. He became unemployed shortly thereafter, not because the union procured his discharge from his job but because of an injury. When he subsequently recovered from his injury and sought employment through the union hiring hall, he was denied job referrals, whereupon he sued the union. (Gonzales v. International Association of Machinists, 142 Cal. App. 2d 207, 209-211, 221-222, 298 P. 2d 92 (1956).) It was the refusal of referrals from the union hiring hall which accounted for the larger part of the damages award ($6800), the remainder

($2500) being for mental suffering. The union conceded that the reinstatement order was within the power of the state court, but argued that the damages award was not. This Court disagreed, stating that

> "[n]o radiation of the Taft-Hartley Act requires us thus to mutilate the comprehensive relief of equity and reach such an incongruous adjustment of federal-state relations touching the regulation of labor. The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although if the unions' conduct constituted an unfair labor practice the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not in such a case as is here presented deprive a party of available state remedies for all damages suffered. See International Union, United A.A.A.I.W. v. Russell, 356 US 364, 2 L Ed 2d 1030, 78 S Ct 932.
>
> "If, as we held in the Laburnum Case, certain state causes of action sounding in tort are not displaced

> simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote. The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. . ."
> (356 U.S. at p. 621.)

b. Petitioner argued below and reiterates here that to the extent that this branch of the exception has continued vitality, a matter discussed below, the instant case falls squarely within it. The Court of Appeal was of the opinion, however, that Petitioner's cause of action for infliction of emotional distress was governed by Motor Coach Employees v. Lockridge, supra, 403 U.S. 274, Plumbers Union v. Borden, supra, 376 U.S. 690

and Ironworkers Union v. Perko, 373 U.S. 701 (1963) rather than by this exception. In Perko, Borden and Lockridge, the acts complained of involved interference with existing or prospective job rights of the involved employee, and in all three cases this Court pointed to such interference as the primary feature which distinguished Lockridge, Borden and Perko from Gonzales, which was said to have focussed on purely internal affairs. The Court of Appeal reasoned herein (see Appendix A to the Petition for Writ of Certiorari, pp. 9-26) that since one of the many instances of misconduct involved actual refusal to refer Petitioner to a job already promised him and since a number of others involved hiring hall discrimination, this case was indistinguishable from Borden, Perko and Lockridge.

Borden was the first labor pre-emption decision to apply the distinction between conduct involving "internal union affairs" and conduct which interferes with existing or prospective employment relations. In Borden, a union member, in apparent violation of a hiring hall rule, obtained the promise of a job from an employer who then requested the member's dispatch from the hiring hall. The union's refusal was the basis of the lawsuit. In Perko, decided with Borden, the plaintiff was a foreman whose employer fired him at the behest of the defendant union, to which the plaintiff happened to belong, although it would not appear that in his capacity as foreman he was a member of any bargaining

unit for which the union served as bargaining representative. The union's request was prompted by the plaintiff's breach of an internal union rule and followed the plaintiff's suspension from membership. Subsequently, it would appear, the union also prevented him from obtaining further work as a foreman.[17/] In Lockridge, the plaintiff was suspended and then expelled from his union and terminated from his job under a union security clause for falling behind in his dues, even though on a fair reading of the security clause the period specified for making good his arrearages may well not have expired.

From the foregoing, it should be obvious that Borden, Perko and Lockridge are hardly distinguishable from Gonzales on the basis that Gonzales focusses upon purely internal affairs while they do not, and that they touch upon employment relations while Gonzales does not. Gonzales, in sustaining an award of damages for lost wages, clearly transcended the purely internal aspects of the dispute which gave rise to

---

17/

By what means he was kept from obtaining other supervisory work, the Court's opinion does not make clear, nor does it indicate whether the plaintiff was ever kept from obtaining any other category of employment. In any event, this latter aspect of the union's conduct does not seem to have figured prominently in the Court's reasoning.

the lawsuit, and Borden, Perko and Lockridge arose no less clearly than did Gonzales out of disputes over essentially intraunion matters.

Predictably, there has been much confusion as to how much of Gonzales survived Borden, Perko and particularly Lockridge.

One possible view is that Lockridge and Gonzales are completely inconsistent and that Gonzales was overruled sub silentio by Lockridge at least insofar as Gonzales authorized damages in addition to reinstatement. This seems to have been the view of the dissenters in Lockridge (403 U.S. at pp. 302 et seq.; see also Cox, Labor Law Preemption Revisited, supra, 87 Harv.L.Rev. at pp. 1375-1376.)

Another possible view is that to the extent that Gonzales differs from Borden, Perko and Lockridge, Gonzales survives unimpaired, so that an action involving Gonzales' distinguishing features may still result in an award not only of reinstatement in the union if the member has been expelled, but of appropriate damages. This alternative may be more hypothetical than actual, but it would appear that in at least two significant respects the conduct in Gonzales and in this case is in fact distinguishable from that in Borden, Perko and Lockridge.

In the first place, the conduct in Borden, Perko and Lockridge raised issues which might be regarded as particularly within the expertise of the Labor Board and there existed in those cases a risk of inconsistency between judicial resolution of the issues and the Board's resolution if the controversy had been placed before it. In Borden the issue was the validity of the union rule breached by the plaintiff. Since the Board might decide either that the employee had a Section 7 right to ignore the rule or that the rule was proper and enforceable, the union's refusal to honor the employer's dispatch request fell in the "arguable" borderline area between protected or permitted conduct and prohibited conduct. In Perko, the issue was whether the union was chargeable with violations of Sections 8(b)(1)(A) and (B) and Section 8(b)(2) in causing the discharge of a member who might be classified either as a "supervisor" outside the protections of the Act or an "employee" within them. (See §§ 152(3) and (11).)[17a/] Again, these issues placed the union's conduct within the "arguable" zone between protected or permitted conduct and prohibited conduct. Lockridge turned upon the construction of the union security clause under which the plaintiff was terminated, a task for which the Court believed the Board particularly suited. Since the

---

17a/ As to violation of Section 8(b)(1)(B) see this Court's subsequent discussion in Florida Power & Light v. Electrical Workers, 417 U.S. 790 (1973).

clause might arguably be construed either as supporting or forbidding the union's action, the conduct in Lockridge too might be deemed within the mentioned borderline zone. In Gonzales, on the other hand, the conduct complained of was either clearly outside the Act (certainly the expulsion was in this category) or, to the extent not clearly outside the Act, it was either clearly prohibited under Section 8(b)(2) or arguably prohibited in the second of the two senses discussed above -- that is, it was not by any stretch of the imagination protected. As has already been pointed out (see Section I B 2 c), this case is within the Act or arguably within it (if at all) in precisely the same way.

There are of course problems with this kind of distinction. In the first place, the issue in Lockridge was the meaning of the union security clause, not its validity. As Professor Cox has pointed out, construction of contracts is something courts do all the time and are as competent to do as the Board, Lockridge to the contrary notwithstanding. (Cox, Labor Law Preemption Revisited, supra, 85 Harv. L.Rev. at pp. 1370-1371, 1375.) In the second place, the distinction assumes the propriety of denying courts the power to decide whether conduct arguably within the Act is or is not actually within it even though denial of that power may prevent any resolution of the issue whatsoever. Nonetheless, accepting Lockridge on its own terms and assuming continuing adherence to the Garmon formula, the suggested distinction is tenable.

A second distinction is that the interference with existing or prospective employment relations in Borden, Perko and Lockridge was far more direct and immediate than in either Gonzales or this case. Perko and Lockridge involved a single act directly affecting a job already possessed by the employee, and Borden involved a single refusal to refer the plaintiff to a job actually promised to him. The "crux" of the action in those cases was thus an interference with a member's job of precisely the sort Congress meant to proscribe when it enacted Section 8(b)(2). (See section I A 2 b (2), supra.) Here, by contrast, only one instance of misconduct concerned actual or promised employment and that instance constituted but a small part of the total. Continuing refusal to dispatch Petitioner from the hiring hall -- precisely the kind of conduct for which damages for lost earnings were allowed in Gonzales -- formed a much larger part of the misconduct. Such misconduct obviously does not involve actual or existing employment and it cannot be said to involve even prospective employment in the sense that Borden did.

This distinction is no exercise in mere formalism. As has already been pointed out (see Section I A 2 b, supra) the legislative history of the Act indicates that while Congress specifically intended to ban the closed shop and to prevent the use of union shop agreements to force the discharge of expelled members from jobs they already possessed, Congress never considered whether the Board ought to police job referrals of paid-up union members from hiring

halls operating under permissible collective bargaining agreements in order to protect such members against reprisal for intraunion political activity. Although the Board (see Section I B 2 c, supra) and this Court (see Local 357, International Brotherhood of Teamsters v. NLRB, supra, 365 U.S. 667 at p. 677; Radio Officers v. NLRB, supra, 347 U.S. 17, at pp. 39-42) appear to have concluded that the Act does empower the Board to regulate such referrals, and although Petitioner does not mean to quarrel with that determination, the fact remains that regulation of such activity cannot be regarded as central to the Act's purposes. Indeed, that function must be seen as only peripheral to Congress' main objectives, if the term "peripheral" is to have any meaning in the present context.

A third distinction, turning not on the nature of the conduct involved but on the nature of the relief afforded, is that in Borden, Perko and Lockridge the damages awarded were for lost earnings alone, a form of relief the Board could have given, while in Gonzales the damages award, although including lost earnings, included as well a sum for mental suffering, which was clearly beyond the Board's power. The passage quoted from Gonzales above suggests that the difference between state and federal remedies was one basis for the decision. The instant case is an even clearer case in that regard, since compensatory damages awarded herein included no sum for lost earnings and consisted entirely of damages for severe emotional distress, which could not have been obtained from the Board.

c. The irony of the situation is that to the extent that Borden, Perko and Lockridge encroach at all upon Gonzales, they represent a misreading of Garmon and they ignore the most potent evidence of Congress' intent respecting the issues on which this case turns.

As already noted, Garmon cited Gonzales with evident approval as involving matters of peripheral federal concern. This characterization revealed a clear understanding of Congress' limited purposes in enacting the Labor-Management Relations Act, an understanding not reflected in Borden, Perko and Lockridge. It would be perhaps too much to claim that Garmon's citation to Gonzales exhibits a degree of prescience as to the impact of legislation Congress was deliberating over as Garmon was handed down. But it is in any event a fact that in 1959, Congress, in passing the Labor Management Reporting and Disclosure Act, provided the clearest possible indication not only that the Labor-Management Relations Act had not been intended to regulate relations between union members and their unions -- that is, internal union affairs -- but also that Congress believed that the Labor-Management Relations Act had not been intended to pre-empt state regulation of such internal union affairs.[17b/]

The process of debate and compromise which culminated in the enactment of Title I of

---

17b/ It is highly significant that the Labor Management Reporting and Disclosure Act receives only footnote reference in the majority opinion in Lockridge (403 U.S., at pp. 288-289, footnote 5) and no mention whatever in Borden and Perko.

the Labor Management Reporting and Disclosure Act commenced when Senator McClellan of Arkansas, to everyone's evident surprise, proposed a sweeping "Bill of Rights" for union members as a floor amendment to S. 1555, a bill which until then had been rather narrowly focussed on specific abuses uncovered in the hearings before the McClellan Committee (2 NLRB, Leg. Hist. of LMRDA, p. 1102); see Aaron, The Labor Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851, 858-859 (1960).) Doubtless recognizing that the proposed "Bill of Rights" would be highly unpalatable to organized labor, which had actually supported a bill similar to S. 1555 the previous year, Senator John F. Kennedy, one of the sponsors of S. 1555, opposed the McClellan amendment, arguing that "if the proposal were enacted, the present rather exhaustive remedies under the common law of various states might be wiped out." (2 NLRB, Leg. Hist. of LMRDA, p. 1108.) Senator Kennedy emphasized that the states had provided "broad protections for members of voluntary organizations," and cautioned his colleagues that enactment of the amendment might be detrimental to rather than promotive of the rights of union members. (2 NLRB, Leg. Hist. of LMRDA, p. 1109.) Senator Kennedy specifically referred to a classic law review article by Professor Clyde Summers (Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1050-1051 (1951)) stating that the cases discussed in the article "show the broad protections which are given to union members by state courts for any breach of their right to speak, against being expelled from unions, and

against excessive fines." (2 NLRB, Leg. Hist. of LMRDA, p. 1113.)[18/] In reply to Senator Kennedy's argument, Senator Holland of Florida suggested that "[a]ny plenary provision against pre-emption would certainly preserve states' rights as they are, and it would, at the same time create a new body of effective federal law. . . . There is nothing new in the idea of concurrent legislation or concurrent protection of rights." (2 NLRB, Leg. Hist. of LMRDA, pp. 1109-1110.) In response to Senator Kennedy's arguments and Senator Holland's suggestion, Senator McClellan then offered a further amendment, later enacted as Section 603(a) of the Act (29 U.S.C. § 523(a)), specifically preserving members' rights and remedies under other

---

18/ It is interesting to note that in the course of the debates, Senator Kennedy indicated that union members' rights could be adequately protected not only by state application of existing state law but by state enforcement of the Taft-Hartley amendments. Senator Kennedy acknowledged that Senator Morse of Oregon was correct in attributing to Kennedy the following position: "[Senator Kennedy] feels that this amendment is not necessary because already, under the Taft-Hartley law . . . there is adequate protection if the states, in turn, will carry out the provisions of the Taft-Hartley law in this particular field." (2 NLRB, Leg. Hist. of LMRDA, p. 1111; see also pp. 1108, 1110.)

federal and state laws. (2 NLRB, Leg. Hist. of LMRDA, p. 1114.)[19/]

Senator McClellan's "Bill of Rights" amendment was initially adopted by the Senate (2 NLRB, Leg. Hist. of LMRDA, p. 1119) but upon cooler reflection, a bipartisan group of senators decided that Senator McClellan's "Bill of Rights" was too loosely worded, and drafted a tighter version which was offered by Senator Thomas Kuchel of California and adopted by the Senate in place of the McClellan version (2 NLRB, Leg. Hist. of LMRDA, pp. 1220-1239; Aaron, The Labor Management Reporting and Disclosure Act of 1959, supra, 73 Harv. L. Rev. 851, 859.) A second savings provision included in the Kuchel version was enacted without further amendment

---

19/ Section 603(a) provides as follows:
"Except as explicitly provided to the contrary, nothing in this Chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization . . . under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this Chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State."

as Section 103 of the Act.[20/]

What emerges from the foregoing is that there was a common belief among both those favoring and those opposed to the "Bill of Rights that the states still possessed the power to protect union members against mistreatment by their unions. Moreover, it is obvious that Congress intended that the states continue to enjoy their assumed existing power without let or hinderance, even where state law might go well beyond federal law, and that union members have a free choice between state or federal courts and state or federal law. (See Summers, Preemption and The Labor Reform Act -- Dual Rights and Remedies, 22 Ohio St. L. J. 119, at p. 125 (1961); Boilermakers v. Hardeman, 401 U.S. 233, at p. 244, Footnote 11.)

An examination of the state law to which the 1959 debates referred is highly instructive.

20/ Section 103 provides as follows:
"Nothing contained in this title [Title I] shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal or under the constitution and by-laws of any labor organization." (29 U.S.C. § 413.)

From the inception of the labor movement, the courts had encountered disputes between unions which were attempting to organize workers and individual employees who refused to join. In some states, the courts held that it was unlawful for a union to prevail upon an employer to discharge or refuse to hire non-union workers when the union's purpose was "to compel the latter against their will to join the association ..." (Plant v. Woods, 176 Mass. 492, 502, 57 N.E. 1011 (1900); Fairbanks v. McDonald, 219 Mass. 291, 106 N. E. 1000 (1914); Ruddy v. United Association, 79 N.J.L. 467, 75 A. 742 (1910), aff'd 81 N.J.L. 574, 79 A. 1119 (1911); Perkins v. Pendleton, 90 Me. 166, 38 A. 96 (1897).) It would be a gross exaggeration, however, to say that individual working men could rely on the protection of law in this kind of situation, and indeed judicial thought on the issue was not unanimous. In a famous dissent in Plant v. Woods, supra, Justice Oliver Wendell Holmes acknowledged that interference with employment relations is ordinarily actionable, but concluded that such interference by a union may be justified when its purpose is to achieve the "unity of organization [which] is necessary to make the contest of labor effectual." (176 Mass. at p. 505.) Some courts, most notably those of New York, rejected the notion that such interference was illegal per se, in favor of a test which looked to the legality of the means which the union had employed in furtherance of its organizing goals. (See National Protective Association of Steam Fitters v. Cumming, 170 N.Y. 315, 63 N.E. 369 (1902).)

The courts also encountered bitter disputes between unions and individual employees who were denied admission to the organization because of high unemployment among union members, personal enmity, or racial animus. Here too, although the courts sometimes afforded some protection to the working man (see Lucke v. Clothing Cutters' & T. Assembly, 77 Md. 396, 26 A. 505 (1893); Carter v. Oster, 134 Mo. App. 146, 112 S.W. 995 (1908); see also Jones v. Marinship Corporation, 25 Cal.2d 721, 155 P.2d 329 (1944)), the law was usually unavailing. (See Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, supra, 58 Mich. L.Rev. at p. 841.)

Because of the glaring insufficiency of existing protections in these areas, it should hardly be surprising that when the Congress enacted the Taft-Hartley Act it saw the closed shop and coercive organizing tactics as abuses particularly requiring prohibition.

Cases involving disputes between union members and their unions presented a marked contrast to disputes arising between unions and non-members. Typical of member-union disputes were cases in which a union punished a "disobedient" member by causing him to be discharged from his job and by threatening other potential employers with "labor trouble" in the event that they hired him. In some cases, the union expelled the individual from the union and he was then automatically terminated under a closed shop agreement. (See, e.g., Brennan v. United Hatters, 73 N.J.L. 729,

65 A. 165 (1906).) In other instances, although the individual was not expelled from membership, he lost his job and the opportunity to find other work as a result of pressure exerted upon employers by the union. (See Blanchard v. Newark Joint Dist. Council, 77 N.J.L. 389, 71 A. 1131 (1909).)

Many of the early decisions in this area analogized unions to such other voluntary associations as churches and fraternal organizations and, reflecting a traditional reluctance to interfere with the affairs of those voluntary associations, held that courts lacked jurisdiction to review membership decisions of labor unions. (See Summers, Legal Limitations on Union Discipline, supra, 64 Harv. L. Rev. at 1050-1051.) But even though an expulsion might not have been subject to judicial review, the courts came increasingly to allow actions against unions for conspiracy and tortious interference with employment relations in favor of an individual member whose "right to his handiwork as a means of subsistence [had] been malevolently taken away ...." (Shinsky v. Tracey, 226 Mass. 21, 24, 114 N.E. 957 (1917); See also Brennan v. United Hatters, supra, 73 N.J.L. 729, 65 A. 165; Connors v. Connolly, 86 Conn. 641, 86 A. 600 (1913).)

Eventually, the courts recognized that voluntary organizations like labor unions and professional associations differ markedly from other voluntary associations in that they often exercise a "strangle-hold upon their members through their control of an occupation...which can ill be spared."

(Chaffee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993, 1022 (1930).) Accordingly, since loss of union membership frequently meant that an individual would lose his job and the opportunity for any employment within his trade, the courts granted relief in particular cases by invoking the fiction that the individual had been deprived either of "property rights" or of rights under an implied contract between the union and its members. (See Summers, Legal Limitations on Union Discipline, supra, 64 Harv. L. Rev. at pp. 1050-1058.) Or, as California Supreme Court Justice Matthew O. Tobriner has expressed it, the common law courts "cut through traditional contract principles to establish rights and obligations based on relationship or status." (Tobriner & Grodin, The Individual and The Public Service Enterprise, 55 Cal. L. Rev. 1247, 1260 (1967); See also, Pinsker v. Pacific Coast Society of Orthodontists, 12 Cal. 3d 541, 553-554, 116 Cal. Rptr. 245, 526 P.2d 253 (1974).)

The prevailing view thus came to be that union membership is a legally protected interest subject to a broad range of remedies, including reinstatement for wrongful expulsion. (See, e.g., Madden v. Atkins, 4 N.Y. 2d 283, 174 N.Y.S. 2d 633, 151 NE2d 73 (1958); Williams v. National Organization, Masters, Mates & Pilots, 384 Pa. 413, 120 A.2d 896 (1956); Cason v. Glass Bottle Blowers Association, 37 Cal. 2d 134, 231 P.2d 6 (1951); Leo v. International Union of Operating Engineers, 26 Wash. 2d 498, 174 P.2d 523 (1946); Annotation, 74 ALR 2d 783 (1958);

Annotation, 21 ALR 2d 1397 (1951).)

Remedies came to reflect the full range of the harms which might flow from wrongful expulsion or discipline of a member by his union. In the article to which Senator Kennedy referred on the floor of the Senate, Professor Summers summarized these remedies as follows:

> "If the expulsion has caused the disciplined member to be discharged or has prevented him from obtaining work, he can recover the wages lost as a result of the wrongful expulsion. Although he must attempt to mitigate damages by seeking other work, he need not pay an illegal fine or assessment in order to maintain himself in good standing and protect his employment rights. Damages are not always limited to loss of wages, but may include mental suffering resulting from humiliation, loss of association, and injury to reputation, and if the discipline was in bad faith, punitive damages may be awarded."
> (Legal Limitations on Union Discipline, supra, 64 Harv. L. Rev. at pp. 1093-1094; Footnotes omitted.)[21/]

21/ Professor Cox in fact found existing state remedies so satisfactory that he saw little point in the "Bill of Rights" provisions governing in-

(con't p. 83)

It is noteworthy that while damages awards often accompanied orders of reinstatement, damages for lost wages and other consequential effects of wrongful expulsion were frequently awarded in the absence of an order, or even a request, for reinstatement in a union. (See, e.g., Cason v. Glass Bottle Blowers Association, supra, 37 Cal.2d 134, 231 P.2d 6; Savard v. Industrial Trades Union, 76 R.I. 496, 72 A.2d 660 (1950); Walker v. Grand International B. of L. Engineers, 186 Ga. 811, 199 S.A. 146 (1938); Grand International B. of L. Engineers v. Green, 210 Ala. 496, 98 So. 569 (1923).)

It should be clear from the foregoing that while Gonzales may today be the orphan child of labor pre-emption law, the judgment of the state court which was affirmed in Gonzales was by no means atypical under pre-Garmon law. It should also be clear that the present action, while presenting more egregious union abuses, is different in kind from the common run of cases arising under the body of state law which Congress expressly indicated it wanted to preserve.

21/ (con't) internal union discipline (§ 411(a)(5)), deeming them essentially a codification of existing law. (Cox, Internal Affairs of Labor Organizations Under the Labor Reform Act of 1959, supra. 58 Mich. L. Rev. at pp. 835-838.)

C. Recognized Exceptions for Actions Founded Upon Breach of a Union's Duty of a Fair Representation or Upon Improper Imposition of Union Discipline are also Applicable

The three causes of action to which Respondents' demurrer was sustained in the trial court were attempts to invoke some of the other exceptions described above. (See Section II A, supra.) It may be that those causes of action and the various other applicable exceptions are not before this Court in any direct sense, but the other exceptions do merit consideration here because they illustrate to what extent Congress and the courts have permitted lawsuits founded upon conduct supposedly within the purview of the Labor-Management Relations Act and the jurisdiction of the Board, and thus what kinds of conduct may be regarded as of only peripheral concern to the scheme of labor relations regulation embodied in the Act. Moreover, it is by no means certain that the allegations of the single surviving cause of action herein do not suffice to state a claim within the recognized exceptions for actions for breach by a union of its duty of fair representation, or for a union's imposition of discipline upon a member in violation of the procedural and substantive standards set forth in the Labor Management Reporting and Disclosure Act. Indeed, at least as to cases involving breach of the duty of fair representation, this Court has held that in order

to do substantial justice, the pleadings must be liberally construed (See Czosek v. O'Mara, 397 U.S. 25, 27 (1970)) and both federal and California law have long rejected the doctrine of "theory of the pleadings." (Federal Rules of Civil Procedure, Rule 8(a); Nord v. McIlroy, 296 F.2d 12, 14 (9th Cir., 1961); Fletcher v. Western Nat'l. Life Ins. Co., supra, 10 Cal.App.3d 376, 399, 89 Cal.Rptr. 78.) Petitioner therefore submits that whatever the form or theory of the single cause of action on which he was permitted to go to trial, if the misconduct complained of therein falls within either of these further exceptions, his action ought not to be deemed pre-empted.

1. Duty of Fair Representation

a. The concept of a union's duty to fairly represent its members is a broad one. It is in essence the responsibility of a union selected as exclusive bargaining agent by a majority of the employees to discharge its agency by making a genuine effort to represent the interest of each employee fairly, without hostility and in complete good faith and honesty. (Hines v. Anchor Motor Freight, Inc., ___ U.S. ___ (March 3, 1976); Humphrey v. Moore, 375 U.S. 335, 342 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1952).)

Originating in this Court's decision in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) a case arising under the Railway

Labor Act (45 U.S.C. § 151 et. seq.) and involving racially motivated discrimination by a union against some of the employees it represented, the concept of the duty of fair representation quickly migrated into the National Labor Relations Act and was eventually broadened to proscribe union discrimination against members based on considerations quite apart from racial prejudice. (Vaca v. Sipes, supra, 386 U.S., at p. 182; see, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, supra, 51 Tex. L. Rev., 1059-1065, 1095-1109.)

The issue of breach of the duty of fair representation may arise either in the context of a suit under Section 301 of the Labor-Management Relations Act for breach of a provision of a labor agreement (Vaca v. Sipes, supra, 386 U.S. 171, 186; Buzzard v. Local Lodge 1040, International Association of Machinists, supra, 480 F.2d 35, 40) or in a suit involving no such contractual breach (Vaca v. Sipes, supra, 386 U.S. at p. 187, as characterized in Motor Coach Employees v. Lockridge, supra, 403 U.S. 274, 299; Smith v. Sheet Metal Workers, 500 F.2d 741 (5th Cir., 1974); Retana v. Apartment, Motel, etc. Union, 453 F.2d 1018 (9th Cir., 1972)). Such actions for breach of the duty of fair representation lie outside the scope of the pre-emption doctrine and may be brought in either state or federal courts. (Motor Coach Employees v. Lockridge, supra, 403 U.S. 274, 298; Vaca v. Sipes, supra, 386 U.S. 171, 181-187.)

b. Here, Section 204.1 of the Master Labor Agreement between the District Council and the involved employers provided for "open and nondiscriminatory employment lists for the use of workmen desiring employment on work covered by this Agreement."[22/] (CT 105; App 5.) Section 204.4 of the Master Agreement further provided as follows:

> "The local Union or District Council will dispatch in accordance with the request of the Contractor . . . qualified and competent workmen from among those entered on said lists . . . in the following order of preference and the selection of workmen . . . shall be on a nondiscriminatory basis:
>
> "204.4.1 Workmen specifically requested by name . . .
>
> "204.4.2 Workmen who, within the five years immediately before the Contractor's order for men have performed work of the type covered by this Agreement in the geographic area of the Agreement . . ., provided such workmen are available for employment." (CT 105-106; App 5-6.)

22/ This Agreement was introduced by Petitioner as an exhibit without objection from Respondents. (RT 686; Ex. 32.)

The Respondents' refusal to dispatch Petitioner in response to the single specific employer request involved herein was an obvious breach of Sections 204.4 and 204.4.1 of the Master Agreement. Respondent's continuing refusal to dispatch Petitioner when his name reached the top of the out-of-work list and their use of a number of pretexts to place his name at the bottom of the list constituted an indisputable violation of Sections 204.4 and 204.4.2 of the Master Agreement. These breaches of their contractual obligations to Petitioner gave rise to a clear right of action under Section 301 of the Labor-Management Relations Act. (Buzzard v. Local Lodge 1401 International Association of Machinists, supra, 480 F. 2d 35, 40; Breitteger v. Columbia Broadcasting System, 43 Cal.App.3d 283, 117 Cal.Rptr. 699 (1974); Magallanes v. Local 300 Laborers' International Union, 40 Cal.App.3d 809, 115 Cal.Rptr. 428 (1974); Shaw v. Metro-Goldwyn-Mayer, Inc., 37 Cal.App.3d 587, 113 Cal.Rptr. 617 (1974); cf. Richardson v. Communications Workers of America, 443 F.2d 974, 980-981 (8th Cir., 1971).)

Moreover, even ignoring the foregoing breaches of the provisions of the Master Agreement, the hiring hall discrimination and the campaign of harrassment and intimidation directed at Petitioner were beyond question a violation of the union's duty of fair representation and the mental anguish they caused was beyond all doubt actionable. (See Smith v. Sheet Metal Workers, supra, 500 F.2d 741; Richardson v. Communications Workers of America, supra, 443 F.2d at pp. 982-985; see also Magallanes v. Local 300,

Laborers' International Union, supra, 40 Cal. App.3d at pp. 815-816, 817; Shaw v. Metro-Goldwyn-Mayer, Inc., supra, 37 Cal.App.3d at pp. 599-601.

c. In the Court of Appeal, Respondents claimed that the judgment herein could not be sustained on a theory of breach of the duty of fair representation, even assuming that theory was properly before the Court of Appeal, because (1) Petitioner had not exhausted his internal union remedies (App. Op. Br., p. 6; App.Rep. Br., pp. 6-8), (2) punitive damages may not be awarded in an action for breach of the duty of fair representation (App. Op. Br., pp. 93-97; App. Rep. Br., pp. 19-20) and (3) the jury was not properly instructed with respect to the duty of fair representation (App. Rep. Br., pp. 6-8). On the assumption that these issues will be again raised in this Court, Petitioner addresses each of them.

(1) It is sufficient to indicate with respect to exhaustion of internal union remedies that Petitioner twice sought aid from the District Council and it was twice refused. (See Summary of Facts, supra.) It is significant that while Respondents claimed in the Court of Appeal that they might somehow show that Petitioner's efforts were in some sense insufficient (App. Rep. Br., pp. 6-7), their responses to interrogatories during the course of discovery indicate that Petitioner's efforts were all that the union's own rules required of him. (CT 478, 483; App 22-23.)

It might be added that Respondents can hardly claim that they were unaware at the time of trial that the issue was actually or potentially an important one, since they had included failure to exhaust internal remedies as an affirmative defense in the Answer they filed to the First Amended Complaint after their demurrer had been sustained to the first, third and fourth causes of action thereof. (CT 206; App 21.) Moreover, because Petitioner's evidence that the District Council had turned a deaf ear to his entreaties tended to show that the District Council had knowingly concurred in and ratified the acts of Daley and his disciples and because without such ratification the District Council could not be held liable for any punitive damages awarded (Coates v. Construction and General Laborers Local 185, 15 Cal.App.3d 908, 913-914, 93 Cal. Rptr. 639 (1971); see CT 541; App 49), the District Council had every motive for showing that Petitioner had never made a cognizable appeal to it for relief from Daley's abuse. But the District Council offered no evidence whatever that Petitioner had failed to invoke its aid in a proper manner.

In any event, the courts have shown a high degree of tolerance toward failure by a mistreated union member to follow to the letter prescribed internal union procedures before filing suit when it is clear that the member has substantially complied or that even the most punctilious compliance would have been futile. (Peterson v. Rath, Packing Co., 461 F.2d 312, 315-316 (7th Cir., 1972);

Gray v. International Assn. of Heat Workers, 447 F.2d 1118, 1123-1124 (6th Cir., 1972); Frederick v. System Federation No. 114, 436 F. 2d 764, 768-769 (9th Cir., 1970); see Dorn v. Meyers Parking System, 395 F.Supp. 779, 782-786 (E.D.Pa., 1975); Simpson & Berwich, Exhaustion of Grievance Procedures and the Individual Employee, 51 Tex. L. Rev. 1179, 1214-1226 (1973).)

(2) As to the availability of punitive damages in an action for breach of the duty of fair representation, the authorities are somewhat split (compare Williams v. Pacific Maritime Association, 421 F.2d 187 (9th Cir., 1970) and Holodnak v. AVCO Corp., 514 F.2d 285 (2nd Cir., 1975) with Harrison v. United Transportation Union, 530 F.2d 558, 562 (4th Cir., 1975); Zamora v. Massey-Ferguson, 336 F.Supp. 588, 591 (S.D. Iowa, 1972); and Tippett v. L & M Tobacco Co., 316 F.Supp. 292, 298 (D.N.C., 1970); Patrick v. I.D. Packing Co., 308 F.Supp. 821, 824, 826 (S.D. Iowa, 1969); Sidney Wanzer & Sons, Inc., v. U.S. Milk Drivers Union, 249 F.Supp. 664, 670-671 (N.D.Ill., 1966)) but the most recent and by far the best-reasoned authority favors such awards.

Williams and Holodnak, supra, which were relied upon by Respondents in the Court of Appeal, are weak authority indeed. Williams, a brief one and one-half page opinion, devotes a scant thirty-three words to the issue (421 F.2d at p. 1289). Holodnak sidesteps the issue, concluding simply that "exemplary damages are not available . . .

in the sui generis circumstances before us." (514 F.2d at p. 293.) Far from suggesting that punitive damages should be disallowed in all cases, this determination indicates that in some cases they may be appropriate.

The Harrison case, on the other hand, offers compelling policy considerations in support of punitive damages awards:

> "All jurisdictions agree that the purposes of punitive damages are to vindicate the plaintiff, punish the wrongdoer and set an example that the tortious conduct should not be repeated. See Northwestern National Casualty Co. v. McNulty, 307 F.2d 432, 435-36 (5 Cir. 1962); Adams v. Hunter, 343 F.S. 1284 (D.S.C. 1972); aff'd. 471 F.2d 648 (4 Cir. 1973). While compensatory damages may to some degree serve the same purposes, it is not unusual in a fair representation suit against a union to find the liability for compensatory damages to be de minimus. (St. Clair v. Local No. 515, [61 LC para. 10,559] 422 F.2d 128, 132 (6 Cir. 1969). Unless punitive damages are available an employee may lack the strong legal remedy necessary to protect his right against a union which has either maliciously or in utter disregard of his rights denied him fair representation. The situation is analagous to that

> present in civil rights actions where the plaintiff's rights are equally important and often difficult to enforce without the threat to defendants of liability for punitive damages in an aggravated case. Courts have held in civil rights suits that the 'federal common law of damages' is controlling and permits the recovery of exemplary or punitive damages, even in those cases where compensatory damages may be merely nominal. Basista v. Weir, 340 F.2d 74, 87 (3 Cir. 1965)." 530 F.2d, at p. 562.

Respondents also relied in the Court of Appeal on an analogy which they perceived between actions brought under Section 301 of the Labor-Management Relations Act and actions brought under Section 303 of the Act for damages suffered by an employer through union violation of Section 8(b)(4). (App. Op. Br., p. 97.) Respondents quite correctly pointed out that under Teamsters Local 20 v. Morton, supra, 377 U.S. 252, punitive damages cannot be recovered in a Section 303 action. The distinction between Section 303 and Section 301 actions should be obvious, however. It is one thing to prohibit punitive damages in an action for economic loss suffered through a union's misuse of its economic weapons against an employer who is clearly its adversary and who has economic weapons of his own with which to defend himself. It is quite another to bar such damages when union officials

ignore their obligations toward a helpless member to whom they stand in a fiduciary relation (see Richardson v. Communication Workers of America, supra, 443 F.2d at p. 980) and vengefully use their awesome powers over his welfare to do him harm.

As a matter of fact, the mentioned distinction between employer actions and member actions not only explains why the rule against punitive damages in the former situation should not bar such damages in the latter situation, but it confirms the wisdom of the reasoning of the Court of Appeal in Harrison v. United Transportation Union, supra. The purely compensatory damages recoverable by an employer are potentially large enought to render violations of Section 8(b)(4) counter-productive, so that the deterrent function of Section 303 actions will be well enough served in the usual case without the need for punitive damages. On the other hand, as Harrison points out, the harm done by union misconduct toward an individual member, though it may well be catastrophic to the member, will seldom be so severe in absolute dollar terms that the threat of an award of compensatory damages alone will have any appreciable deterrent effect upon the union.23/

23/ Certainly in this case the back pay award Petitioner received for the Respondents' refusal to honor the employer dispatch request did nothing to deter further like misconduct.

It might be added that since in cases like this one there is an area of overlap between the right to be fairly represented and the rights afforded by the Labor Management Reporting and Disclosure Act, and since punitive damages may clearly be recovered in actions brought under the Labor Management Reporting and Disclosure Act (see Section II C 2 d, infra) it makes no sense whatever to deny punitive damages in duty of fair representation actions. To the contrary, the more rational course would be to give across-the-board recognition to the courts' clear judgment that permitting union members suffering mistreatment at the hands of their unions to recover punitive damages will not offend and indeed will tend to effectuate national labor policy.

(3) As to jury instructions, while it is true that the jury was not specifically instructed on the law governing an action for breach of the duty of fair representation, the instructions actually given imposed on Petitioner a far more onerous burden of proof. Instead of the arbitrary or bad faith conduct which the jury would have had to find to support a determination that the Respondents had breached their duty of fair representation (see Vaca v. Sipes, supra, 386 U.S. at p. 190; Motor Coach Employees v. Lockridge, supra, 403 U.S. at pp. 299-301) the jury was required to find outrageous conduct which inflicted severe emotional distress. (CT 515, 524, 527, 528; App 34, 38, 40.)

In addition, the jury was instructed that it must find "oppression" or "actual malice" before it could award punitive damages. (CT 540; App 48-49.)

Obviously, oppression or actual malice goes far beyond mere arbitrary or bad faith misconduct.

2. Actions Under the Labor Management Reporting and Disclosure Act

a. As already noted, actions brought for violation of the protections of the Labor Management Reporting and Disclosure Act are outside the scope of the Garmon rule. (Hardeman v. Boilermakers, supra, 401 U.S. 233, 237-241; Boilermakers v. Braswell, 388 F.2d 193, 196-197 (5th Cir., 1968); Machinists v. King, 335 F.2d 340, 346-347 (9th Cir., 1964).) Section 102 of the Act specifically authorizes actions to be brought in federal court, but it is silent as to actions in state court. Such authority as exists on the issue is in conflict as to state jurisdiction to entertain such lawsuits. (Compare Safe Workers' Organization v. Ballinger, 389 F.Supp. 903, 910-913 (S.D. Ohio, 1974) with Summers, Pre-emption and the Labor Reform Act--Dual Rights and Remedies, supra, 220 Ohio St.L.J., at pp. 149-151.) But Section 102 resembles Section 301 of the Labor-Management Relations Act in referring only to federal jurisdiction, and Section 301, as we have seen, has been held to authorize actions upon labor agreements in state courts. (Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 506-507 (1962).) Because Section 301 and Section 102 actions may cover identical conduct, it would

seem irrational to permit state courts to assume jurisdiction as to suits arising under the former section but not under the latter. In any event, whether or not a state court may entertain suits founded upon Section 101 and brought under Section 102, state law may clearly be applied by state courts to reach conduct which could be made the subject of a suit under the Labor Management Reporting and Disclosure Act. (See Section II C 2 c, supra.)

b. To the extent that the campaign of harrassment, intimidation and referral discrimination pursued by business agent Daley and others under his control was in reprisal for Petitioner's failure to fall in line with Daley and his policies, it constituted a form of informal discipline. Indeed the thrust of much of the defense offered by Respondents at trial was that their outrageous conduct toward Petitioner was justified because Petitioner was making matters very difficult for Daley and his friends, and because he sometimes caused trouble on the jobs to which he was dispatched. (See pp. 56-61 of the Respondents' Brief filed by Petitioner in the Court of Appeal.) Such informal discipline is wholly improper under the Labor Management Reporting and Disclosure Act.

Perhaps the central provision of the Labor Management Reporting and Disclosure Act's "Bill of Rights" is Section 101(a)(2) which provides as follows:

> "Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views on candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings...."

The obvious purpose of Section 101(a)(2) was to encourage vigorous union debate and to assure union members the right of free expression on intra-union affairs without fear of reprisals.

Another important provision is Section 101(a)(5), which provides as follows:

> "No member of any labor organization may be fined, suspended, expelled or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

Section 102 of the Labor Management Reporting and Disclosure Act provides that a union member may file suit for appropriate relief if any rights secured to him by Title I are "infringed." Furthermore, Section 609 of the Labor Management Reporting and Disclosure Act "makes doubly secure the protection of the members in the exercise of their rights" (See Salzhandler v. Caputo, 316 F.2d 445, 449 (2nd Cir., 1963)) by making it unlawful "for any labor organization, or any officer [or] agent ... thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act," and by specifically providing that any violation of Section 609 may be the subject of a civil action brought under Section 102.

The major interpretive issue, of course, is whether a union member's Section 101(a)(5) right to fair discipline is "infringed" within the meaning of Section 102, or the member is "otherwise disciplined" within the meaning of Section 609, when, in retaliation for his exercise of the right of free expression guaranteed by Section 101(a)(2), a union official makes it impossible for him to secure employment by refusing to make job referrals under an exclusive hiring hall agreement, such as existed here.

(1) The vast majority of the courts which have considered the issue have ruled that "union interference with the employment opportunities of its members may constitute 'discipline,'" and that such informal discipline violates

Section 101(a)(5) when imposed without the required procedural safeguards. (Figueroa v. National Maritime Union, 342 F.2d 400, 406 (2nd Cir., 1965) [refusal to refer under exclusive hiring hall agreement]; Detroy v. American Guild of Variety Artists, 286 F.2d 75, 81 (2nd Cir., 1961) [blacklisting]; see also, Robins v. Schonfeld, 326 F.Supp. 525 (S.D.N.Y., 1971) [blacklisting]; Tirino v. Local 164, Bartenders etc. Unions, 282 F.Supp. 809, 816-817 (E.D. N.Y., 1968) [procural of dismissal from job and refusal to provide referrals through hiring hall]; Burris v. International Brotherhood of Teamsters, 224 F.Supp. 277, 279 (W.D.N.C., 1963) [blacklisting]; see also Christensen, Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Society, 43 N.Y.U. L. Rev. 227, 232-239 (1968); Etelson and Smith, Union Discipline Under the Landrum-Griffin Act, 82 Harv. L. Rev. 727, 732-735 (1969).)

(2) However, even assuming arguendo that interference with employment opportunities does not constitute "discipline" for the purposes of the procedural protections of Section 101(a)(5), it does not necessarily follow that such interference is not proscribed by Section 609. Nearly all of the circuits which have considered the issue have striven to protect the individual member's interest in his substantive right of free speech on internal union affairs and have concluded that despite the similar language, Section 609 has a broader reach than Section 101(a)(5), precluding any retaliation for a member's exercise of free speech.

Thus, in Machinists v. King, supra, 335 F.2d 340, where officer-members of a union were summarily removed from office because they had supported an unsuccessful candidate in a union election, it was held that while the procedural safeguards of Section 101(a)(5) do not protect an officer from being summarily removed from office (335 F.2d at 341-343), the members had been unlawfully "disciplined" within the meaning of Section 609 because their removal from office had been in reprisal for their exercise of protected rights. The court therein concluded as follows:

> "Thus, to construe Section 609 to exclude from its coverage dismissal from union office would immunize a most effective weapon or reprisal against officer-members for exercising political rights guaranteed by the Act without serving any apparent legislative purpose; and, as we have noted, the members thus exposed to reprisal would be those whose uninhibited exercise of freedom of speech and assembly is the most important to effective democracy in union government." (335 F.2d at p. 345.)

As recently as January of this year, the court which decided King reaffirmed its holding therein. (Cooke v. Orange Belt Dist. Council of Painters, 529 F.2d 815 (9th Cir., 1976). Moreover, at least four other circuits have been persuaded by reasoning in King. Gabauer v. Woodcock, 520 F.2d 1084, 1090-1091 (8th Cir., 1975); Wood v. Dennis, 489 F.2d 849, 854 (7th Cir., 1973); Schonfeld v. Penza, 477 F.2d 899, 903

(2nd Cir., 1973); Sewell v. Machinists, 445 F.2d 545, 550 (5th Cir., 1971); but see Wambles v. Teamsters, 488 F.2d 888, 889 (5th Cir., 1974); Sheridan v. Carpenters Local 626, 306 F.2d 152, 156 (3rd Cir., 1962) [opinion of Kalodner, J.].)

If it is thus clear that the threat of dismissal from union office has an unduly coercive affect on a member's uninhibited exercise of free speech, it should be no less clear that the threat of perpetual unemployment provides a much stronger mechanism for the stifling of dissent and of vigorous union debate. And while the union may have an arguably legitimate interest in demanding the loyalty of its officers, there is no conceivable legitimate union interest in blacklisting ordinary members who speak out. Blacklisting or refusal of job referrals through an exclusive hiring hall, when done in retaliation for a member's political opposition within the union must therefore constitute unlawful "discipline" within the meaning of Section 609.

It should be added that an interpretation of the term "discipline" so narrow as to preclude a union member from suing for any wrongful act other than an expulsion, suspension, or fine, is inconsistent with the proscription in Section 609 of unlawful conduct by "any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof . . ," since many persons within the categories enumerated are not empowered by a union to expel, suspend or fine a member. Rather, such persons are capable only of inflicting less formal (if no less

damaging) kinds of punishment, like physical violence or interference with a member's job rights. Since Section 609 recognizes that these persons are capable of imposing "discipline," it would appear that such misconduct as violence, intimidation or interference with job rights was intended to be remediable by a civil suit under the Labor Management Reporting and Disclosure Act. Indeed, it would be a startling anomaly for Congress to have authorized the courts to fashion a panoply of remedies (which now include compensatory damages, punitive damages and awards of attorney's fees) in order, for example, to protect a member against formal suspension from the union for exercising his right to speak out, but to have denied similar relief to a union member subjected for identical reasons to the worst kind of informal discipline, like that involved here, which may result in far more serious economic and emotional harm. The legislative history manifestly demonstrates that Congress entertained no such intent.

In introducing his proposed "Bill of Rights of Members of Labor Organizations," Senator McClellan stated that:

> "The [McClellan- committee found time and again the denial of the right to vote, the denial of the right to work, the denial of the right to have a voice, the denial of the basic human rights on which our very freedom was founded."
> (2 NLRB Leg. Hist. of the LMRDA, p. 1103; emphasis added.)

Senator McClellan alluded specifically to the problem of union blacklisting in retaliation for a member's exercise of protected rights and emphatically stated that his amendment would seek to remedy that problem:

> "They are afraid of reprisals against them. Two waitresses from Chicago testified that it required six months to get a job. Union officials go around and interfere. They say to a prospective employer, 'If you hire this person, you will have labor trouble.' They cannot come here and tell the truth without risking reprisals.
>
> "This provision is for the benefit of the working people, the people from whom some of these parasites draw the life blood which courses through their veins." (2 NLRB Leg. Hist. of the LMRDA, P. 1103.)

The intensity of these comments is indicative of the climate in which the Congress considered and adopted Title I of the Labor Management Reporting and Disclosure Act. Although there was vigorous debate as to many aspects of the proposed legislation, no member of Congress ever so much as suggested that the Act would not provide a remedy to union members who are subjected to a long siege of unemployment as a consequence of speaking out on union affairs.

c. The doctrine of exhaustion of internal remedies applies to Section 102 actions just as it does to actions for breach of the duty of fair representation. (NLRB v. Industrial Union of Marine Workers, 391 U.S. 416, 425-428 (1968); Detroy v. American Guild of Variety Artists, supra, 286 F.2d 75.) As indicated in Petitioner's discussion of the exhaustion doctrine as applied in the duty of fair representation context (see Section II C 1 c (1), supra), it is scarcely open to dispute here that Petitioner did all he was required to do by union rules. Moreover, in this context just as in the context of duty of fair representation actions, failure to pursue to the bitter end the union's specified internal procedures is excused when it would be essentially futile to do so. (Semancik v. UMW Dist. 5, 466 F.2d 144, 150-151 (3d Cir., 1972); Steib v. New Orleans Clerks' Local 1497, 436 F.2d 1101, 1106 (5th Cir., 1971); Fulton Lodge No. 2, International Assn. of Machinists v.Nix, 415 F.2d 212, 216 (5th Cir., 1969); Cefalo v. International District 50, UMW, 311 F.Supp. 946, 953 (D.D.C., 1970); Farowitz v. Association Musicians of Greater New York, Local 802, 241 F.Supp. 895, 906-908 (S.D.N.Y., 1965).)

d. The damages awarded by the jury, including the substantial punitive damages, are consistent with, and in fact tend to effectuate the federal policies articulated in Title I of the Labor Management Recording and Disclosure Act.

As we have seen, Congress has pursued a dual policy in correcting particular labor abuses, not only providing for public enforcement of the National Labor Relations Act but authorizing private enforcement of various other laws. The remedies allowed under a private enforcement action may vary considerably from those available to the Board. As already noted, the Board is authorized only to issue orders requiring those subject to its jurisdiction to cease and desist from committing unfair labor practices and to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." (§ 10(c).) The Board is not authorized to award punitive damages (see Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940)) or compensation for anything but lost earnings, nor may it ordinarily award a sum to recompense the charging party for attorneys' fees or other extraordinary expenses. (Mead v. Retail Clerks, Local 839, 77 CCH Labor Cases, para. 11,114 (9th Cir., 1975); Tiidee Products, 194 NLRB 1234, 1236-1237 (1972).)

The remedies and damages allowable to a Title I plaintiff, in contrast, are broad and varied and are clearly intended to compensate him for all harm he has suffered. Since "the rights of all members of the union are threatened" in the event that a single "union member is disciplined for the exercise of any of the rights protected by Title I," and because a lawsuit thus benefits the entire union, the successful plaintiff is entitled to attorney's fees. (Hall v. Cole, supra, 412

U.S. 1, 8; see also McDonald v. Oliver, 525 F.2d 1217, 1226-1229 (5th Cir., 1976.) The decisions also recognize that union members who have been wrongfully denied the right to work are entitled to compensatory damages for loss of wages[24] and for mental suffering and emotional distress.[25]

24/ Ryan v. International Bhd. of Elect. Workers, 387 F.2d 778 (7th Cir., 1967); Kelsey v. Philadelphia Local 8, Theatrical Employees, 294 F. Supp. 1368, 1376 (E.D. Penn., 1968); Sands v. Abelli, 290 F.Supp. 677, 681 (S.D.N.Y., 1968).

25/ Simmons v. Avisco, 350 F.2d 1012, 1018-1020 (4th Cir., 1965); Talavera v. Teamsters, 351 F.Supp. 155, 158-159 (N.D.Cal., 1972). In Boilermakers v. Rafferty, 348 F.2d 307 (9th Cir., 1965) it was held that unless there was accompanying physical harm, no recovery could be awarded for emotional distress. Rafferty, taking a narrow view of the damages available under Title I, relied heavily upon early decisions holding that no attorneys' fees may be awarded under Title I. (Cf. Hall v. Cole, supra, 412 U.S. 1.) In any event, Petitioner did suffer physical injury as well as emotional distress as a result of Respondents' misconduct. Therefore, under Title I, Petitioner would be entitled to recover such damages notwithstanding the Rafferty rule.

Furthermore, the majority of the courts which have considered the question have allowed injured workmen to recover punitive damages as well, concluding that the "awarding of punitive damages in appropriate cases serves as a deterrent to those abuses which Congress sought to prevent." Boilermakers v. Braswell, supra, 388 F.2d 193, 199-200.[26]

26/ See also Cooke v. Orange Belt Dist. Council of Painters, supra, 529 F.2d 815; Morrissey v. National Maritime Union, 397 F.Supp. 659, 669 (S.D.N.Y., 1975); Sipe v. Local Union No. 191, United Brotherhood of Carpenters, 393 F.Supp. 865, 871-872 (M.D. Penn., 1975); Patrick v. I. D. Packing Co., Inc., supra, 308 F.Supp. 821, 823-824; Sands v. Abelli, supra, 290 F.Supp. 677, 684-685; Farowitz v. Associated Musicals of Greater New York, Local 802, supra, 241 F.Supp. 895, 909. Contra, supra, Burris v. International Bhd. of Teamsters, supra, 224 F.Supp. 277, 280-281. It is noteworthy that while Title VII of the 1964 Civil Rights Act followed the lead of the National Labor Relations Act in authorizing only equitable "make-whole" remedies (see Van Hoomissen v. Xerox Corp., 368 F.Supp. 829, 835-838 (N.D. Cal., 1973)), punitive damages may be awarded "under certain circumstances" for a violation of Section 1 of the Civil Rights Act of 1866 (42 U.S.C. § 1981; see Johnson v. Railway Express Agency, 422 U.S. 454, 460 (1975); but see EEOC v. Detroit Edison Co., 515 F.2d 301, 308-309 (6th Cir., 1975) Petition for Cert. pending sub. nom. Stamps v. Detroit Edison Co., # 75-239).

One or two further observations are in order on punitive damages. In the present case, the jury awarded Petitioner $7500 in compensatory damages for the emotional distress caused by Respondents' extreme and outrageous conduct. Additionally, the jury awarded, and the able trial judge upheld, punitive damages in the amount of $175,000. In the Court of Appeal, Respondents assailed the award of punitive damages on the ground of excessiveness. (App. Op. Br., pp. 102-118.) The Court of Appeal never reached that issue because it believed Petitioner's entire claim to be preempted.

The punitive damages award is not nearly as disproportionate to the compensatory damages as Respondents would like it to seem. In addition to the harm for which Petitioner was actually compensated, he suffered a significant loss of wages over a two-year period. Due to the uncertain state of the law as a result of decisions like Borden, Perko and Lockridge, Petitioner refrained from seeking lost wages, and the jury was instructed that no lost wages could be awarded. (CT 102-114, 530; App 1-16, 41.) That Petitioner was damaged extensively but utterly denied compensation in this regard should be a highly significant factor in the consideration of any claim that the award of punitive damages was excessive.

Furthermore, no specific request or award for attorneys' fees was made below, although California courts, like this Court and other federal courts, subscribe to the theory that attorneys' fees are appropriately granted in lawsuits which benefit

all members of the plaintiff's class. (See Mandel v. Hodges, 54 Cal.App.3d 596, 619-624, 127 Cal.Rptr. 244 (1976); Hall v. Cole, supra, 412 U.S. 1; United Steelworkers v. Butler Manufacturing Co., 439 F.2d 1110, 1112-1113 (8th Cir., 1971).) This, too, is a relevant factor in determining whether the amount of punitive damages was inappropriate.

The conduct herein, as has been demonstrated, is within the core of union activity which Congress sought to regulate by enacting Title I of the Labor Management Reporting and Disclosure Act and by preserving parallel state common law remedies. A large award of punitive damages will sometimes be necessary to deter unlawful retaliatory conduct by union officials, and thus to assure full union democracy.27/ The jury and the trial judge

---

27/ "Strong reasons of policy promote the use of exemplary damages to deter union officials from conduct designed to suppress the rights of members. . . The very basis for the existence of unionism in our society today is the promise of employment to those who desire to associate freely in order to obtain it. The right of the working man to the benefits of collective bargaining is too essential and valuable to be hindered, impeded and seriously damaged by irresponsible and dictatorial leaders whose dominance in any given situation

(con't p. 111)

determined that such an award was compelled here by the Respondents' egregious misconduct and that determination ought not to be lightly rejected. Because the misconduct was so protracted and so heinous, and because the compensatory damages claimed were so modest in comparison to what might have been awarded, there is nothing in the award of punitive damages which could offend federal policy. To the extent that Respondents' quarrel with the punitive damages award is based on state law, that is of course a matter for the Court of Appeal on remand.

27/ (con't) does great disservice to the purpose and principles of unionism. . . Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect." (Fittipaldi v. Legassie, 18 A.D.2d 331, 239 N.Y.S. 2d 792, 796 (1963).)

III. IF THE AUTHORITY OF CALIFORNIA'S COURTS TO DEAL WITH THE KIND OF MISCONDUCT HEREIN INVOLVED IS PRE-EMPTED, THE QUESTION ARISES WHETHER THE RESULTING INJUSTICES ARE WARRANTED BY ANY SIGNIFICANT FURTHERANCE OF THE NATIONAL LABOR POLICY OR WHETHER, ON THE OTHER HAND, A REEXAMINATION OF THE PRE-EMPTION DOCTRINE IS IN ORDER

If the instant case is pre-empted under the Garmon principle then the law cries out to be changed.

No one who has had to struggle with the pre-emption doctrine as it has developed in the area of labor relations law can avoid concluding that the Garmon principle, for all its claimed simplicity and universality, suffers serious failings as a rule of law, failings which have led to widespread criticism of the principle. (See, e.g., Cox, Labor Law Preemption Revisited, supra, 85 Harv. L. Rev. 1337; Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, supra, 51 Tex. L. Rev. 1037; Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon, supra, 72 Col. L. Rev. 469; Hooton, The Exceptional Garmon Doctrine, supra, 26 Lab. L. J. 49; Note, Preemption of State Labor Regulations Collaterally

in Conflict with the National Labor Relations Act, 37 G. Wash. L. Rev. 132 (1968); Michelman, State Power to Govern Concerted Employee Activities, 74 Harv. L. Rev. 641 (1961).

As already suggested, in the kind of situation presented by the Garmon case (which involved an award of damages to an employer by a state court under state labor relations law for a union's use of arguably protected economic weapons in a recognitional dispute with the employer) the Garmon principle is indeed easy to apply and, except where the subject conduct is only arguably within the Act, it usually produces a proper result. (See Sections I A 4, I B 2 a (2), I B 2 b (3).)

But when the Garmon principle has been applied to fundamentally different situations, involving not the relationship between employer and union but the relationship between union and union member (see Lockridge, Borden and Perko), it has frequently yielded results which are difficult to justify in terms of fundamental fairness, for the Labor Board has unreviewable discretion to refuse even a clear case, and if a court declines to hear a case because the Board might take it, the individual worker can be left without a remedy. Moreover, in producing such results, Garmon has gone far beyond the basic purposes of the pre-emption doctrine, for state regulation of conduct which is largely unrelated to the process of employee self-organization and collective bargaining scarcely hampers implementation of the national labor policy, particularly where

state law does not purport to regulate labor relations as such. (See Sections I B 1 and 2, supra.)

In addition, the Garmon principle has lost much of its original simplicity in the context of member-union disputes. This is in part because of the development, already adverted to, of a number of judicial and legislative exceptions to the basic principle (see dissenting opinion of Mr. Justice White in Lockridge, supra, 403 U.S. at p. 309; Bryson, A Matter of Wooden Logic: Labor Preemption and Individual Rights, 51 Tex. L. Rev. 1037, 1040-1041; Hooton, The Exceptional Garmon Doctrine, Lab. L. J. 49; Section II A, supra) and in part because of the valiant but largely unsuccessful attempts of this Court to square some of the later cases (see Borden, Perko and Lockridge, supra) with the pre-Garmon decisions (see Gonzales, Laburnum and Russell, supra), which embodied different and possibly irreconcilable concepts of pre-emption, but which this Court was nonetheless unwilling to overrule. As a matter of fact, the exceptions to the Garmon doctrine in the area of member-union disputes have all but swallowed the rule. The uncertain extent of what remains of the rule in that area has confused both bench and bar and is so subject to manipulation by skillful pleaders and result-oriented judges that the outcome in many cases bears little relation to the merits. (See Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, supra, 51 Tex. L. Rev. at pp. 1045-1050.)

Finally, the most attractive of the claimed attributes of Garmon -- that its ostensibly simple formula provides a rule of decision for all cases -- has been exposed as illusory by this Court's decision in Teamsters Local 20 v. Morton, supra, 377 U.S. 252. Under Morton, it will be recalled, conduct which is clearly neither protected nor prohibited by the Act may still be foreclosed to regulation by the States if Congress focussed on such conduct but declined to prohibit it, at least where leaving such conduct unregulated was part of the balance Congress struck between the conflicting interests of unions, employers, employees and the public.

If Garmon is unsatisfactory as a rule of law in the present context, what are the alternatives?

One would be to resurrect Gonzales and exclude disputes arising out of internal union affairs from the operation of Garmon. This was the position of Justices Douglas and White in their dissents in Lockridge (403 U.S., pp. 302, et seq).

As Professor Cox has observed,

> "[o]n the one hand, the membership clause may be an organizing tool, compelling employees to become union members, enriching the union treasury, and securing the union's

status as exclusive bargaining representative. But where the union is strong and its status secure, the chief consequence of union job control is to enhance the effectiveness of sanctions for breach of union discipline by depriving the individual of his job if he is expelled from the union. The section 8(a)(3) and (b)(2) restrictions outlawing the closed shop and prohibiting discharge under a union shop agreement unless membership is terminated for nonpayment of dues serve two purposes: (1) they afford a measure of protection for freedom of choice, thus entering the field of labor-management relations; and (2) they provide the individual victim of union discipline with protection in his job and a remedy for its loss if he is expelled for improper reasons or because of errors in procedure. The legislative history makes it plain that Congress realized that sections 8(a)(3) and (b)(2) enter the field of union-member relations.

"If all discharges pursuant to a union shop clause had their greatest effect on freedom of self-organization, the usual rule of preemption should apply even though the necessity of excluding state law is less than in labor disputes. But if all the cases were preponderantly concerned with procedural or

substantive abuse of the power of expulsion, there would be no reason for preemption and there would be good cause to follow the LMRDA policy of allowing states to provide remedies for a union's oppression of its members. In fact, the cases sometimes fall primarily in one category and sometimes in the other, and even a case that is preponderantly one of individual oppression may have collateral impact upon freedom of choice." (Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. at pp. 1373-1374.)

Professor Cox goes on to point out that allowing an employee expelled from his union and then discharged from his job to sue in court for both damages and reinstatement in the union cannot have any substantial impact upon either the balance of power between union and management or the effectiveness of the federal regulatory scheme. Moreover, such a lawsuit is likely to provide quicker and more reliable relief and will in any event obviate dual proceedings. (85 Harv. L. Rev. at p. 1376.) On that basis, Professor Cox argues that Gonzales should be rehabilitated and Lockridge overruled, although he would adhere to the results (if not the reasoning) in Borden and Perko, since those cases involved only lost earnings which the Board had the power to award. (85 Harv. L. Rev. at pp. 1375-1376.)

While Professor Cox does not directly address situations like the present one -- where job control is exercised upon a member by some means short of expulsion and results in damage other than or in addition to wage loss -- it is obvious that similar considerations dictate that lawsuits be permitted in such situations. Here, as in the case of actual expulsion, there is little likelihood of any serious effect on labor-management relations if a member lawsuit is permitted, and although there exists here no problem of dual proceedings, there is also no possibility of any relief from the Board, since emotional rather than economic harm was the basis of the lawsuit. The question of dual proceedings will, of course, arise in cases where both lost earnings and some other item of damage are claimed; the parallel between Gonzales and such cases will be even more precise.

Removing member-union disputes from the operation of the Garmon rule (except perhaps where the Board could and probably would do full justice) would accomplish several important objectives.

First and foremost, it would correct the serious injustices which occur under present law. Individual working men would no longer either be left without remedies or relegated to partial remedies available only at the unreviewable discretion of the Board.

Secondly, it would bring the law as applied into line with Congress' express intent as reflected in the provisions and the legislative history of the Labor-Management Relations Act. (See Sections I A 2 d, II B 2 c, supra.)

Furthermore, it would yield substantial dividends in the form of ease of judicial administration. That is of course what the Garmon principle was supposed to do, but far from simplifying pre-emption issues in the area of member-union suits, Garmon has spawned extensive litigation over the scope and reach of the several exceptions to the Garmon rule. If the Garmon principle were inapplicable in the first place, there would be no need constantly to wrestle with the many difficult issues inherent in the recognition of exceptions to Garmon. To the extent that any controls might prove necessary to preclude conflict between federal labor policy and the remedies developed by the courts to protect members from abuse by their unions, this could be accomplished by adjustments to the applicable substantive standards, as indeed it has already been accomplished with respect to suits for breach of the duty of fair representation (see, e.g., Vaca v. Sipes, supra, 386 U.S. at p. 193; Motor Coach Employees v. Lockridge, supra, 403 U.S. at pp. 297-301) and with respect to at least some state tort actions (see Linn v. Plant Guard Workers, supra. 383 U.S., at pp. 63-66). Moreover, it could be accomplished at no greater and probably a much lesser cost in judicial time and effort than the courts, including this Court, have

had to expend (and doubtless would be compelled to expend in the future) upon the pre-emption doctrine and its exceptions.

The chief disadvantage of simply limiting Garmon in the manner suggested above is that while such an approach would largely remedy the problems Garmon has caused in the area of member-union disputes, it would still leave unresolved various difficulties in the area of labor-management disputes. Among these is the risk that if a court declines to decide a case because the Board might exercise jurisdiction but the Board in fact refuses jurisdiction, the dispute will go undecided. (See Section I B 2 a (2), supra.) Another is the impossibility of obtaining a Board determination of whether conduct arguably protected is actually protected or not. (Ibid.) A third is that Garmon does not provide a complete resolution of pre-emption issues, for conduct which is neither protected nor prohibited may still be permitted by federal law and may thus be outside the regulatory power of the states. (See Section I B 2 d, supra.)

The answer to these difficulties lies in a new formulation of the pre-emption doctrine as applied to labor relations law, a formulation based on the principle enunciated in Teamsters Local 20 v. Morton, supra, 377 U.S. 252.

Professor Cox argues that since the national labor legislation was enacted against a backdrop of local laws creating rights of property, bodily

security and personality and preserving public order, health and welfare -- laws which apply to everyone regardless of his involvement or non-involvement in employee self-organization or collective bargaining -- the relevant inquiry when a rule of local law is invoked in a dispute arising in a labor relations context is not whether that rule might indirectly affect the federal scheme of labor relations law. Rather, assuming that the conduct is not in fact protected (in which case state regulation is clearly barred) the question is whether the local law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees and the public in the process of employee self-organization and collective bargaining, such as has already been made by Congress in enacting the labor relations law. The expanded Morton principle would preclude state regulation of conduct subject to the labor laws where the state sought to reach its own accommodation of the same interests but not where the state's purposes were unrelated to labor relations as such.

The Morton approach envisaged by Professor Cox would require an initial determination that the conduct in question was not actually protected. This determination Professor Cox would allow the courts to make, precisely in order to avoid the problem of disputes with no forum willing to resolve them. (85 Harv. L. Rev. pp. 1361-1363, 1366-1367.)

If the conduct in question were determined not to be protected, the inquiry would then shift to the purposes underlying the rule of local law sought to be invoked. It might seem at first blush that such an inquiry would entail the same laborious process of "litigating elucidation" which this Court evidently eschewed in Garmon, but in fact the process would be, or could easily be made, essentially painless. As Professor Cox has pointed out (see 85 Harv. L. Rev. at pp. 1365-1368), virtually all of this Court's pre-emption decisions in the area of labor-management disputes (see Section I A 3, supra) are consistent with the Morton principle, and this Court could avoid the need to relitigate the fact situations involved in them simply by approving their results. Since these cases encompass many of the significant situations in which pre-emption problems are likely to occur, they should provide valuable guidelines in any future cases which may arise and render relatively uncomplicated the task of the lower courts in applying the new principle, not to mention the task of this Court in supervising its application. To the extent that prior decisions did not control future cases, Morton would embrace the best of both the pre-Garmon and post-Garmon worlds as a rule of decision. It would require an examination of policy considerations, such as characterized the pre-Garmon decisions (see Section I A 3, supra), an approach vastly superior to the mechanical application of an unvarying standard which may or may not produce a result consistent with the fullest realization of both state and federal interests. Moreover, it would provide a single

test -- as Garmon was intended to do but clearly does not -- for the full resolution of all pre-emption issues arising in the area of labor-management disputes.

In the context of member-union disputes, the Morton formula would visibly curtain the pre-emptive effect of the Labor-Management Relations Act. Perhaps the greatest change wrought by the new principle would lie in the express recognition of the broad exception for state tort law of general application which Petitioner has urged was impliedly recognized in Linn v. Plant Guard Workers, supra, 383 U.S. 53. (See Section II B 1, supra.) The body of state law typified by International Association of Machinists v. Gonzales, supra, 356 U.S. 617, would also be accorded full legitimacy, not just because the Labor Management Reporting and Disclosure Act so provides (although that is reason enough), but because an exception for such law is a logical corollary of Morton; for if the Labor-Management Relations Act at most only incidentally touches upon the relations between union members and their organizations, state law regulating those relations can hardly be deemed to involve an accommodation of the same interests Congress weighed in adopting the Act. The exception for actions brought directly under the Labor Management Reporting and Disclosure Act would of course remain by virtue of Congress' obvious intent that such actions not be deemed pre-empted. The exception for actions based upon the duty of fair representation, although it does not derive directly from the Morton principle

would survive for the reasons stated in Vaca v. Sipes, supra, 386 U.S. at pp. 180-186 and Motor Coach Employees v. Lockridge, supra, 403 U.S. at p. 301: namely, that the right to fair representation is too crucial, Board remedies for its breach are too limited and the possibility of conflict between the Board and the courts is too slight to bar legal relief. (See Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, supra, 51 Tex. L. Rev., at pp. 1063-1070.)

With this approach, as with the more cautious alternative of limiting Garmon, any conflict which may arise between national labor policy and remedies developed in the courts to protect union members may be resolved by adjustments to the applicable substantive standards. But because member-union and labor-management disputes are of such a fundamentally different nature, it is hardly to be anticipated that any serious conflicts will occur.

CONCLUSION

The nub of Petitioner's position herein is that the Garmon principle, as extended by Borden, Perko and Lockridge to disputes between union members and their unions, attempts to protect the federal scheme of labor relations law from the merest possibility of interference by other bodies of law, at the frequent sacrifice of the

fundamental right of individual working men to fair treatment by their unions and in the face of compelling evidence that Congress neither feared any such possibility of conflict nor desired any such sacrifice of important rights. With no significant considerations of policy favoring its application to member-union disputes and every consideration of fairness opposed to such application, the Garmon doctrine should, at the very least, be narrowly construed in the context of internal union affairs and its exceptions broadly construed. Far better would be the confinement of Garmon to labor-management disputes, to which the principle was originally designed to apply, or better still its replacement with a principle more rational in its operation, like that announced in Morton. Under any of these approaches (if not indeed under existing law) the instant action would be within the clear jurisdiction of the California courts.

For the foregoing reasons, it is respectfully urged that the decision of the Court of Appeal be reversed and Petitioner's claim be held within the jurisdiction of the courts of the State of California.

Respectfully submitted,

G. DANA HOBART
GERALD KANE

Attorneys for Petitioner

APPENDIX A

Section 7 of the Labor-Management Relations Act (29 U.S.C. § 157) provides as follows:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

Section 8 of the Labor-Management Relations Act (29 U.S.C. § 158) provides in pertinent part as follows:

> "(a) It shall be an unfair labor practice for an employer --
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in secion 157 of this title; . . .

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor orgazniation: Provided That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor orgazniation is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, employees eligible to vote in such election have noted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership

in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . . .

(b) It shall be an unfair labor practice for a labor organization or its agents --

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such

organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . . .

Section 301(a) of the Labor-Management Relations Act (29 U.S.C. § 185(a)) provides as follows:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 101 of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 411) provides in pertinent part as follows:

"(a)(1) Equal Rights.--Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization,

to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of Speech and Assembly--Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations. . .

(4) Protection of the Right to Sue--No labor organization shall limit the right of any member thereof to institute an action in any courts or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named

as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action. -- No member of any labor ort anization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

"(b) Any provision of the constitution and by laws of any labor organization

which is inconsistent with the provisions of this section shall be of no force or effect."

Section 102 of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 412 provides as follows:

> "Any person whose rights secured by the provisions of this subchapter [Title I] have been infronged by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged Violation occurred, or where the principal office of such labor organization is located."

Section 103 of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 413) provides as follows:

> "Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization."

Section 603(a) of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 523(a)) provides as follows:

> "Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State."

Section 609 of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 529) provides as follows:

> "It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section."